80-6514

NO. A-658

APR 13 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

SAMUEL CHRISTOPHER HAWKINS PETITIONER

VS

THE STATE OF TEXAS RESPONDENT

SUPPLEMENTAL AND PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

PRO SE
SAMUEL C. HAWKINS
ELLIS UNIT #590
HUNTSVILLE TEXAS
77340

4-7-81

Question Presented
I

Whether The Opinion Of The Court Of Criminal Appeals Of Texas Affirming Petitioner's Conviction And Sentence Of Death Raises Federal Constitutional Claims When The Court Upheld deprivation Of Petitioner's Right Under The 5th, 6th 8th And 14th Amendments Not To Incriminate himself or be Forced To Give Evidence Against himself by An Involuntary Confession?

How The Federal Question was Raised And Decided On Below.

This Issue Now raised In This Petition For Writ Of Certiorari was Presented To The Trial Judge On Motion To Suppress The Confession because Tape Transcripts And Petitioner's Testimony Shows Undisputed Evidence Now And Then Of An Involuntary Confession. Appendix C. D. E. DX1 SX7 SX4. All a Part Of The Record Of The Trial Court. Volume II S.F. Page 254 Line 13 Through Page 258 Line 3 Volume II Page 355 SX7 Vol II Page 356 DX1

The Same Undisputed Evidence was Presented To The Texas Court Of Criminal Appeals And Rejected. See Appendix A. Page 19-22. Opinion Of The Court. The Court Quoted The Promises made To Petitioner And Still Rejected Same. See Vol VIII Page 1549 Through 1568. Police Admits The Statements were made.

Reason For Granting The Writ

The Court Should Grant Certiorari To Consider Whether The Texas Court Of Criminal Appeals In Affirming Petitioner's Conviction And Sentence Of Death Compelled Petitioner To Give Evidence Against himself Violating his 5th, 6th, 8th And 14th Amendments Right?

The Texas Court Of Criminal Appeals Erred by Rejecting Clear And Admitted Evidence That Shows by Testimony And State's Exhibit And State's Witness That Promises And Improper Influence was used by Police Officers. Under Oath.

Petitioner Was arrested about (12) Twelve NOON June 30 Th 1977 was Interrogated For A Total Of (17) Seventeen hours by Several Police Officers who used delay In Taking petitioner before a magistrate To Secure a Confession

See Volume II Page 254 Line 13 - P 258 Line 3. Vol VIII 1587 Line 10 Through 1593 Line 2 Vol VIII P 1597 Line 8 - 1599 Line 14.

The State Placed State's Exhibit No. 7 Into The Record After The Court viewed The Same. This 38 Page Transcript Is only one hour Of The Seventeen hours Interrogation Of Petitioner Samuel C. Hawkins.

Petitioner Placed Defense Exhibit No. 1 In Evidence Which State's Exhibit No 7 Supports Fully. Volume II Page 355 Volume II Page 356 They are Tape Transcripts Taken After 12 hours Of Interrogation Of Samuel C. Hawkins Petitioner.

Apendix C. DX1 D. SX7 E. SX4 "IT IS Something That you ~~#~~ yourself Can't Hold yourself at Fault for. ITa...ITS Something That we CAN Help you with and we will Try. we will do That. We understand what your Situation Is. we do. We are NOT hear TO IN any way PUNISH you or Criticise you because we understand what your Situation IS."

STate Exhibit 4 P3 Virtually The ~~IN~~ Idential Quotation appears at STate's Exhibit No.7 P3 Defendant Exhibit NO.1 CONTAINS The same Quotation P2

"I Think That They (The COURTS) would observe The FACT That you need help .... you Are Trying TO Seek That Help already Psychological - Psychiatric help and a I Think They would reommend a Psychiatrist"

STATE'S Exhibit NO.4 P.36 The Idential Quotation appears at STate's Exhibit NO. 7 P36 A Similar ~~#~~ Quotation appears at Defendant Exhibit NO. 1 P 32.

"HAWKINS: Will They SENTENCE me TO Die FOR That"?

LaFavers "SAM TO be HONEST with YOU, I would Think That The COURTS, IN your SITUATION would be Very LENIENT, I really do Defendant Exhibit NO 1 P32

STate's Exhibit NO.7 P36 Say WOULD'NT
STate's EXHIBIT NO.4 P 36 Say WOUldNT

This quote comes right before the material I have quoted in paragraph above and would contradict all above if it ~~says~~ says would'nt.

Explained in full context the correct word is would. See below.

"we are talking about a sickness, it's nothing that gets ... it's like..."

"it's like a person having a physical illness you know .... Don't be a...

ashame of the fact that this is not your fault

than if you had caught a cold."

State's Exhibit No.7 P36
Defendant Exhibit No.1 P33
State's Exhibit 4 P36 Far less complete

Garrett: "you was born with it".

Capt. Smith "just like Garrett was big, I was

Born with an ugly mug" That Right."

Capt Smith "we just can't help it, it's a

it's a sickness we got."

State's Exhibit No.7 P37
Defense Exhibit No.1 P33
No.4 Far Less complete"

This Court will see That The OFFicers were Evasive About The most damaging QUOTATION When TestiFying at The Suppression hearing Volume II at 183-84, LaFavers 187-190 Smith at 216-17 Garrett

at The Trial Volume VIII at 1549 Through 1568 Det. LaFavers Admitted The Facts When He was CONFRONTED With The Tape and Transcript but Tried To Explain IT away.

Q. "IT IS NOThing That CaN't be Helped. IT IS SoMeThing That we CAN Help you with, AND we will Try, we Will do That"

A. Mr Hawkins, yes That STaTement was IN The Tape, aSSuch, and ONThe TranscriPT. I dON'T Feel That I had Promised you ANYThing OR Threatened you IN ANY Way Or Held ANYThing back FROM you, That was IN The Tape, yes sir.

Q. Made by who?

A. myself. 1550 Volume VIII

Q. "we UNderSTaND what Your SiTuaTION IS, We are NOT here IN ANY ^ TO PUNISH you or CriTiCise you because IT IS UNderSTandable What Your SiTuaTION IS"

A. yes ^ way

"IT IS SOMETHING THAT YOU DO NEED HELP WITH AND ARE JUST NOW RECOGNIZING THAT!" VOLUME VIII 1551-52

ALL SUCH WERE ATTEMPTED TO BE EXPLAINED AWAY BY DET LA FAVERS.

WHAT EVER HIS EXPLANATION, ONE THING IS CERTAIN HE USED THIS METHOD TO GET A CONFESSION.

1555 LINES 5-11

A. "MY INTENTION WAS NOT TO NECESSARILY PROMISE YOU ANYTHING, MR HAWKINS. WE WERE DISCUSSING IN A VERY PASSIVE SITUATION IN WHICH AT TIMES YOU WOULD BECOME EMOTIONAL I WAS TRYING TO SETTLE YOU AT DIFFERENT TIMES IN ORDER TO CONTINUE THE CONVERSATION THAT WE WERE HAVING."

UNDISPUTED EVIDENCE RENDERS THE CONFESSION INADMISSIBLE LISENBA VS CALIFORNIA 314 U.S. 219 62 S. CT 620 86 L ED 166.
MC HENRY VS STATE 293 S.W.2 773 U.S.C.A. 5, 6, 8, 14.

A CONFESSION MUST BE FREELY GIVEN WITHOUT PERSUASION OR COMPULSION HILL VS STATE 429 S.W.2d 481 C.C.P. OF TEXAS 38.21

ANY SORT OF THREATS OR VIOLENCE, DIRECT OR IMPLIED PROMISES HOWEVER SLIGHT, EXERTION OF IMPROPER INFLUENCE WILL MAKE A CONFESSION INVOLUNTARY HUTTO VS ROSS 429 U.S. ~~25~~ 28 BRAM VS UNITED STATES 168 U.S. 532 542 543 U.S.C.A. 5, 6, 8, 14.

To be voluntary a confession must be the product of an essentially free and unconstrained choice

Jurek vs Estelle 593 F 2d 672
Culombe vs Connecticute 367 U.S. 568 602 81 S. Ct 1860 1879 6 L Ed 2d 1037 (1961) U.S.C.A 5, 6, 8, 14.

The will to confess

The decision to confess must be freely self determined Rogers vs Richmond 365 U.S. 534 544 81 S. Ct 735 5 L Ed 2d 760 (1961) U.S. C.A. 5, 6, 8, 14.

A confession must be the product of a rational intellect and free will Blackburns vs Alabama 361 U.S. 199 208 80 S. Ct 274 280 4 L Ed 2d 242 (1960) U.S.A. 5, 6, 8, 14.

Unnecessary delay in taking an accused before a magistrate will render a confession involuntary

Texas Code of Criminal Procedure 14.06 15.16

Clewis V Texas 386 U.S. 707 709 87 S. Ct 1338 18 L Ed 2d 423. (1967)

Fikes vs Alabama 352 U.S. 191 194 N 2 77 S. Ct 281 1 L Ed 2d 246 (1957) U.S.C.A 5, 6, 8, 14.

The defendant's will to resist must not be overborne Rogers vs Richmond Supra U.S.C.A. 5, 6, 8, 14.

IF The OFFicer Warned The accused The accused That The CONFESSION may be used FOR Him, IT IS NOT Admissible IN Evidence AND This regardless OF The Fact That He was warned also That The CONFESSION might be used against him White VS State 289 S. W. 2 297 U. S. Co A. 5, 6, 8, 14.

IF The Evidence From The OFFicer, as a State's WITNESS IS TO The ~~Of~~ EFFect That He Told DeFendant The CONFESSION Could be used FOR Him, The COURT committed Error IN admitting IT. CONN 143 (2) 1036 McCain 141 (2) 612

Petitioner Prays That a Writ ISSUE TO Review The Judgement OF The Texas COURT OF Criminal Appeals

Respectfully Submitted

Certificate OF Service

I CertiFy That a True AND exact COPY OF This Supplemental PETITION FOR WRIT OF CertiorarI IS mailed pre paid postage, RETURN Receipt Requested TO The

ATTORNEY GENERAL'S OFFICE
Supreme COURT building
P. O. Box 12548
AUSTIN Texas 78711

Certified
P06 5179263
4-7-81
Samuel Hawkins

Samuel Hawkins
Ellis Unit #590
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80-

NO. A-658

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OCTober Term 1980

SAmuel Christopher HAWKINS
PeTiTioner

VS

The STaTe OF Texas
RespondenT

PeTiTion For WriT OF CerTiorari
To The Texas Court OF Criminal Appeals

Pro Se
SAmuel C. HAWKINS
ELLIS UNIT 590
HUNTSVILLE TEXAS
77340

I

Questions Presented

1

Whether The opinion of The Court of Criminal Appeals of Texas Affirming Petitioner's Conviction And Sentence of Death Raises Federal Constitutional Claims when The Court Upheld deprivation of Petitioner's Right under The 5th, 6th, 8th, And 14th Amendments Not to Incriminate himself or be Forced To Give Evidence Against himself by An Involuntary Confession?

2

Whether The Court of Criminal Appeals of Texas Affirming Petitioner's Conviction And Death Sentence Contrary To Texas Laws In Denying Petitioner his Right to A Fair Trial on An Insanity Defense, when Court Appointed Doctors Testimonies had No Probated value, Contradicting Their Reports Filed with The Court? Violating The 5, 6, 8 And 14th Amendments?

3

Whether The Texas Court of Criminal Appeals Affirming Petitioner's Conviction And Death Sentence deprived Petitioner Fundamental Fairness when The Prosecutor used A psychiatrist Dr. James P. Grigson To Mock Petitioner's Self Representation before The Jury, Therefore prejudice The Jury Against Petitioner violating The 5th, 6th, 8th And 14 Amendments To A Fair Trial and Impartial Jury?

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HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW II & III

REASON FOR GRANTING THE WRIT

1

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE TEXAS COURT OF CRIMINAL APPEALS IN AFFIRMING PETITIONER'S CONVICTION AND DEATH SENTENCE COMPELLED PETITIONER TO GIVE EVIDENCE AGAINST HIMSELF VIOLATING HIS 5, 6, 8, AND 14TH AMENDMENTS RIGHTS?

A

THE TEXAS COURT OF CRIMINAL APPEALS ERRED BY REJECTING CLEAR AND UNDISPUTED EVIDENCE THAT SHOWS THAT PROMISES AND IMPROPER INFLUENCE WAS USED BY THE POLICE OFFICERS WHO TESTIFIED UNDER OATH TO SUCH FACTS, EXHIBIT ADDED.

2

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER TEXAS COURT OF CRIMINAL APPEALS DEPRIVED PETITIONER OF ALL MITIGATING CIRCUMSTANCES, AN INSANITY DEFENSE AND ALL FUNDAMENTAL FAIRNESS VIOLATING THE 5, 6, 8, AND 14TH AMENDMENTS RIGHTS?

III

A

Texas Court Of Criminal Appeals erred by Denying Petitioner Any Opportunity To Show His State Of Mind at Time of Offense, Argument Against The Death Sentence Or mitigating Circumstance Against The Death Penalty

3

The Court Should Grant Certiorari To Consider whether Texas Court Of Criminal Appeals Clearly Invidiously discriminated Against Petitioner Contrary To Texas Laws Allowing The Prosecutor To Use a State's Witness, Namely, Dr James P. Grigson A psychiatrist TO Mock Petitioner's Self Representation before The Jury Violating The 5, 6, 8, And 14th Amendments Right?

A

The Texas Court Of Criminal Appeals Erred when It Upheld Mockery Of Petitioner's Right And Actual Self Representation, Therefore Denying A Fair Trial and Impartial Jury.

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NO. A-658

IN The

SUPREME COURT OF The UNITED STATES

OCTober Term 1980

SAMUEL Christopher HAWKINS PETITIONER

VS

The STATE OF Texas RESPONDENT

PETITION For WRIT OF CERTIORARI
TO The TEXAS COURT OF CRIMINAL APPEALS

PETITIONER SAMUEL Christopher HAWKINS Prays That a WRIT OF CERTIORARI ISSUE TO Review The JUDGEMENT OF The COURT OF CRIMINAL APPEALS OF Texas JANUARY 14, 1981

OPINION OF The Texas COURT OF Criminal Appeals ON File NO. A-658

Jurisdiction

The JUDGEMENT OF The COURT OF CRIMINAL APPEALS OF Texas JANUARY 14, 1981. MOTION For Rehearing DENIED February 4Th 1981. A 30 day STAY OF The MANDATE ENTERED February 4th 1981.

JURISDICTION OF This COURT IS INVOKED UNDER 28 U.S.C. 1257 (3) PETITIONER having ASSERTED below AND ASSERTING here deprivation OF RIGHTS Secured by The CONSTITUTION OF The UNITED STATES

Constitutional And Statutory Provisions Involved

This Case Involves The 5th Amendment To The Constitution Of The United States which provides IN relevant Part:

No person Shall be Compelled To Give Evidence Against himself IN A Criminal proceeding.

The 6th Amendment To The Constitution Of The United States which Provides IN relevant Parts:

The accused Shall enjoy The Right To An Impartial Jury.

The 8th Amendment To The Constitution Of The United States Which provides IN relevant Part:

Nor Cruel And Unusual Punishment Inflicted.

And The 14th Amendment To The Constitution Of The United States Which Provides IN relevant Part:

No State Shall deprive Any Person Of Life, Liberty, or Property, without Due Process Of law.

This Also Involves Texas Laws, Texas Penal Code 2.01 which provides IN relevant Part:

All Persons Are Presumed To be Innocent And No person may be Convicted Of Any Offense Unless each element Of The Offense Is Proved beyond A Reasonable doubt.

Texas Code of Criminal Procedure 37.071 which provides in relevant part:

The Defendant or his Counsel Shall be permitted to present Argument against a sentence of Death.

Texas Code of Criminal Procedure 38.21 which provides:

A Statement must Appear to be Freely and voluntarily Given without Compulsion or Persuasion.

Texas Penal Code 8.01 Provides:

IT IS An Affirmative Defense to Prosecution That, At the Time of the Conduct Charged, the actor as a result of mental Disease or defect, either did Not know That his Conduct was Wrong or was Incapable of Conforming his Conduct To the requirement of the law he Allegedly violated.

Statement of Facts

IT IS petitioner First Appearance before The Court

Petitioner was Tried by Jury in The 200th Judicial District Court No. 56,243 of Travis County Texas on Change of venue. For Capital murder. Petitioner Represented himself.

Petitioner Samuel C. Hawkins was Indicted by A Grand Jury IN Potter County Texas For Capital Murder And The Indictment was Filed July 1977 28th Day, IN The District Clerk's OFFice OF Potter County Texas From The 108th District Court NO. 18,056.

The Indictment came about as A Result OF a Confession Taken by Three Police OFFicers AFTer These Three Police OFFicers Promised PeTiTioner help, Told Him He was Sick And IT was NOT his Fault. Promised To Send PeTiTioner TO A PsyChiaTrist To Get Help.

PeTiTioner SAmuel C. HAwKins was INTerrogaTed For SeveNTeen hours IN A Small Police OFFice Room From 12. NOON June 30 1977 UNTil July 1, 1977 6:45Am. PeTiTioner was Never TaKen beFore A MagisTraTe And NO Charge Filed AgainST him.

PeTiTioner was Arraigned August 3rd 1977 IN A DisTricT Court Ed Nobles 108District.
August 9,1977 Judge Nobles Issued A Court Order TO TO have Dr. Hugh A. PeNNal A PsyChiaTrist TO eXamine PeTiTioner.

The EvaluaTion Lasted Four MONTh AT PsyChiaTric Pavilion Amarillo Texas, From SepTember 3, 1977 UNTil December 3, 1977. December 29, 1977 The Report was Filed IN The 108Th DisTricT Court Ed-Nobles. Dr PeNNal Findings. Chronic PsyChosis.

January 10Th, 1978 Through January 16 PeTiTioner was Ordered TO be EvaluaTed by A psyChologisT Dr Richard wall. Dr wall's Report was Filed with The Court JanruaRy 20Th 1978. Finding, Legally INSANE.

ON January 31, 1978 Dr Pennal was ordered to The District Attorney's Office For Consideration To Change his Findings OF petitioner Samuel C. Hawkins And He Testified IN court TO This Fact.

ON February 8th 1978 Court Appointed Counsel Introduce several Documents TO Doctor Wall TO Change his Report. He Testified Also To These Facts IN Court.

All Reports and Testimony A part of This Record And will be Pointed TO, on Questions Raised.

August 1978 one year later Judge Nobles Withdrew himself From The Case and gave A False Reason. See Transcript Vol XIII P ~~25~~ 2254 8, 11, 78

September 9th, 1978 Judge Jerry C. Schackelford Took The Case IN his Court 320 District.

Petitioner Rejected Counsel And Represented himself ON Change ON venue over his objection Vol XII Transcript 2056.

November 27, 1978 Jury selection begin And Petitioner Asked For A Travis County lawyer And was denied. Vol III S. F. Page ~~1 thru~~ 363 Line 1 Through 364 Line 25. Petitioner was IN Travis Count jail 30 days on change OF Venue and No Local Counsel as requested.

The Trial Started December 4, 1978 And Petitioner was Found Guilty And sentenced TO Die. motion For new Trial was denied January 4th 1979 And Notice OF Appeal was Given.

AT The START OF The Trial The Prosecutor Read The INDICTMENT AND PETITIONER Plead NOT GUILTY. NOT GUILTY by Reason OF INSANITY. VOL VIII P 1438 LINES 7- 14.

The STATE's First WITNESS WAS Timmy keys The deceased's BroTher.
He TESTIFIED That He AND Rhonda The VICTIM WAS Home Alone The Night Rhonda LEFT Home. The MoTher IN The Hospital AND The FaTher GONE elsewhere UNKNOW. He SAID She was LAST SEEN by Him beFore She WENT TO bed AND She was FOUND Dead SEVEN days LaTer. They had ReporTed Her To The Police AS MISSING. VOL VIII S.F. P 1446 LINE 19 Through 1453 LINE 15. The ParenTS OF The VICTIM Did NOT TESTIFY, NOR APPEAR AT COURT.

The STATE'S SECOND WITNESS WAS DanLooTen Mr LOOTEN SAID He FOUND A Body, He NEVER IDENTIFIED The Body by NAME or discripTion. VOL VIII S.F. P 1455 LINE 11 Through Page 1460 LINE 25.

The STATE'S Third WITNESS WAS Mr FRANT WitheHead A DeputY SheriFF. TESTIFIED ThaT He FOUND A Body UNDER a CULVERT, He TOOK PICTURES OF SAME, ~~He~~ WAS FOUND IN CarSON COUNTY NOT POTTER COUNTY, Where The OFFENSE IS Alleged To have happen. Smith FUNERAL Home Picked UP The Body ON The SAME Day February 9Th 1976. S.F. P 1464 LINE 17 Through 1486 LINE 9.

The FACTS OF The CASE Follows.
VOL- For VOLUME
S.F.- For STATEMENT OF FACTS
P. - For page
T. - For TRANSCRIPT/DOCUMENTS/MOTIONS/COURT order

This portion of the facts of the case will deal with the confession

There is undisputed evidence in this record that shows petitioner's confession statement was given after 12 hours of a seventeen hours interrogation by police officers who, (1) fail to take petitioner before a magistrate (2) caused psychological stress to and upon petitioner (3) Exerted improper influence upon petitioner to cause him to confess (4) constrained petitioner to confess and (5) petitioner's will was overborne and (6) petitioner's will to resist was overcome

Petitioner was told by police officers who interrogated that he would be helped, a psychiatrist would be appointed to help him, it was not his fault, he was sick, he was born sick, he could help other people if he confess.

All such promises, persuasion, compulsion, improper influence, psychological pressure and a seventeen hour interrogation by several police officers constrained petitioner Samuel C. Hawkins to confess.

See S.F. Vol II P 254 Through P 258 Line 3 petitioner clearly pointed out in his pre trial testimony the involuntariness of his confession.

The state placed state's exhibit no. 7 into the record after the court viewed the same. This 38 page transcript is only one hour of the seventeen hours interrogation of petitioner Samuel C. Hawkins.

IT WAS NOT UNTIL Some 12 TO 15 hours OF The 17hour INTerrogation OF PetitionerSAmue C. HAWKINS Before This Tape WAS Recorded.

yet This Tape Transcript Fully Agrees AND Support PetitionerS Testimony at Pre Trial and Argument To This Court. VOl II S.F P 355. Vol II S.F. P 356 IS PetitionerS EXHibit AND SupportS All FACTS ON The INVOLUNTariness OF The CONFESSION.

Page 2 LINE 17 Through Page 4 LINE 19
Page 35 LINE 20 Through Page 37 LINE 14 OF Both TRANSCRIPTS Shows NO CONFESSION WAS GIVEN beFore Promises, persuasion, IMproper INFLUENCE psyChological pressure AND All else, Plus AFTer 12 hours OF INTerrogation.

AT The Trial PetitioNer Objected TO IT'S INTroduction When The STATE INTroduced The CONFESSION TO The Jury. Vol VIII S.F. P 1496 LINES 5-12.

The STATE'S WITNESS DeT. LAFavers Who WAS ONE OF The INTerrogation OFFICers AND The ONE Who acTually Typed The CONFESSION-STATEMENT

The Court's Reporter Played The Tape To Varify The Prove Transcripts Above.

DeT James LAaFavers TOOK The STAND UNDER OATH as A STATE'S WITNESS beFore The Jury. He Clearly Admitted All Such STATEMENT were made Before ANY CONFESSION WAS GIVEN. He TeSTIFIED That The STATEMENT were made TO PSyChologically CONTROL PetitioNer AND CAUSE Him TO CONFESS.

See Vol VIII S.F. P 1549 LINE 8 Through P 1558 LINE 25.

Petitioner Testified He was promised Help and That He Gave The Confession For Promises and Believed He would be helped by These police OFFicers Vol IX S.F. P 1688 Line 19 Through 1690 Line 11

Petitioner Testified That He WAS NOT Sure He killed The victim but He Confessed because OF The promises and Told That IT matches His M.O. Vol IX S.F. P 1694 Lines 1 Through 25
Police Det. Darrel Garner and State's witness Testified That The police Department Could NOT Corroborate The Confession See Vol VIII S.F. P 1623 Line 19 Through 1629 Line 10

See proof by Two Police OFFicers That Petitioner WAS IN Fact INTerrogated For 17 hours and kept away From A magistrate. Deputy ISSiah Garrett And Cap. E.N. Smith Two of The INTerrogation OFFicers Vol VIII S.F. P 1587 Line 10 Through 1593 Line 2
Vol VIII S.F. P 1597 Line 8 Through 1599 Line 14.

IT has been The Rule IN This Court And IN Texas Court OF Criminal Appeals That, IT IS ONly When IT IS UNdisputed Evidence which would Render The Confession INadmissible, The SAME IS INadmissible as A matter OF law.
Lisenba VS California 314 U.S. 219 62 S. Ct 620 86 L.Ed 166
McHenry VS State 293 S.W.2 773 (1956)
U.S.C.A 5, 6, 8, and 14th.

The Confession of a Defendant may be used in Evidence Against him if it appears That The Same was Freely Given without Compulsion or Persuasion. Hill vs State 429 S.W. 2d 481 Texas Vernon's Annotated Code of Criminal Procedure 1.05 38.21 38.23. United States Constitution 5, 6, 8, And 14th Amendments.

Any Sort of Threats or violence, Direct or Implied Promises however slight, Exertion of Improper Influence will make a Confession Involuntary Hutto vs Ross 429 U.S. 28 Bram vs United States 168 U.S. 532 542 543. U.S.C.A. 5, 6, 8, And 14th.

Court must Ensure That Prosecution Clearly Show That Inculpator Statement Offered into Evidence Against Defendant was Voluntary made After Intelligent and Knowing waiver of Right To Remain Silent and Right To Counsel. Moore vs Ballone 488 F Supp 798 (1980) U.S.C.A 5, 6, 8 And 14th.

To be voluntary a Confession must be The Pproduct of An essentially Free And unconstrained Choice Jurek vs Estelle 593 F 2d 672 (1979) Culombe vs Connecticute 367 U.S. 568 602 81 S. Ct 1860 1879 6 L Ed 2d 1037 (1961) U.S.C.A 5, 6, 8 And 14th

The Decision To confess must be Freely Self Determined. Rogers vs Richmond 365 ~~U.A~~ U.S. 534 544 81 S.Ct 735 5 L Ed 2d 760 (1961). U.S.C.A 5, 6, 8, 14th.

TO be VOLUNTary A CONFESSION MUST be The product OF a rational INTELLECT AND Free will Blackburns VS Alabama 361 U.S. 199 208 80 S. CT 274 280 4 L Ed 2d 242 (1960)

TO be VOLUNTary CONFESSION, The DEFENDANT'S Will TO Resist MUST NOT be OVERBORNE. Rogers VS Richmond Supra U.S. C.A. 5, 6, 8, AND 14th.

IF The OFFICER warned The Accused That The CONFESSION may be used For Him, IT IS NOT Admissible IN Evidence, AND This regardless OF Fact That He was warned Also That The CONFESSION might be used AgainST Him. White VS STATE 289 S.W.(2) 279 U.S. C.A. 5, 6, 8, AND 14th.

The KNOWING INTRODUCTION OF INADMISSIBLE TESTIMONY by PROSECUTOR IN A CRIMINAL case IS ITSELF The KIND "PROSECUTORIAL OVERREACHING" That Prejudice A DEFENDANT'S Right TO A Fair Jury Trial. UNITED STATES VS Whimpy 531 F 2d 768 (5th Cir 1976)
UNITED STATES VS Kessler 530 F. 2d 1246 1257-58 reh den 535 F. 2d 660 (1976)

SINCE PETITIONER WAS INTERROGATED FOR 17 Hours before Taken before A magistrate, CONSTANTLY QUESTIONED by Several police OFFICERS Who USED EXTREME PERSUASIVE Pressure AND PSYCHOLOGICAL Force TO Cause him TO CONFESS.

Texas Law Requires That a Person Who Is Arrested Shall without Unnecessary delay be brought before A Magistrate. Texas Code Of Criminal Procedure Articles 14.06 15.16

This Court has said That This Sort Of Delay Is Evident That a Confession Is Involuntary

Clewis vs Texas 386 U.S. 707 709 87 S. Ct 1338 18 L Ed 2d 423 (1967)

Fikes vs Alabama 352 U.S. 191 194 N2 77 S. Ct. 281 1 L Ed 2d 246 (1957)

And The Reason Is Clear A Magistrate might Help Break The Defendant's Isolation and Lift The Psychological Siege Of law enforcement Authority

How The Federal question was Raised And Decided On.

Appeal was Rejected by Texas Court Of Criminal Appeals

This Court Should Grant Certiorari To Consider Whether Opinion Of The Court Of Criminal Appeals Of Texas Affirming Petitioner Conviction And Death Sentence Violates His 5th, 6th, 8th And 14th Amendments Rights?

This Portion Of The Facts Of The Case Will Deal With Testimony Of Court Appointed Psychiatrist And Psychologist.

Petitioner's Appeal before The Texas Court Of Criminal Appeals On his 12th Ground Of Error The Petitioner Argued That:

The Trial Court Erred In Sentencing him To Death Contrary To Texas Laws.

Petitioner WAS Evaluation by Dr. Hugh A. Pennal A Court Appointed Psychologist. The evaluation Started September 3, 1977 And Continued Four Months Until December 3, 1977. Petitioner WAS Taken To The Amarillo Psychiatric Pavilion For The Evaluation

December 29th 1977 Dr. Pennal's Report WAS Filed With The Court. Finding, Chronicly Psychotic.

A Second Court Appointed Evaluation Of Petitioner By Dr. Richard WALL A Psychologist. On or about January 20th 1978 Dr. WALL Filed his Report with The Court. Finding, Legally Insane, At Time Of Offenses And Presently.

No Second Evaluation Of Petitioner by either Doctor.

In Court before The Jury both Doctors Individually Contradicted Their Reports In Testimony.

Dr. Pennal Testified That He WAS Summoned To The District Attorney's Office And Asked To Consider Changing his Findings. He SAid He Revied Some Files In The District Attorney's Office And Changed & His Report And Finding.

Vol X S.F. P 1840 Line 1 Through P 1843 Line 25.

Dr. Wall's Reports Vol X P 1961. P 1959
Dr. WALL Testified That He Changed his Findings becaus OF Petitioner's Court APPOINTED ATTORNEYS. S.F. Vol IX P 1763 Line 14 Through P 1776 Line 25.

Though both Doctors were Racially prejudice AgainST PeTITIONER AND Showed iT, Their FINDINGS ON Their First ReporT superceeded Their Prejudice IN ParT.

Dr. James Paul GrigSON who TeSTiFied For The STATE, A PSyChiatrisT, Never aT ANY Time EvaluaTed The PeTiTiONer by A COURT, This Texas APPeal CourT Admits IN IT'S OPINION

Dr. GrigSON TeSTimONY ViolaTes Texas Laws, Texas Code OF Criminal Procedure ArTicle 46.02 D.

A WriTTEN ReporT OF examinaTion Shall be SubmiTTed To The CourT WiThin 30 days OF Order OF examinaTion V. A.C.C.P. 46.02 d

IN All OF The Above aCTION AND MADNESS by The STATE OF Texas PeTiTiONer WAS deNied FUNDAMENTAL Fairness. PeTiTiONer WAS deNied A Fair Jury Trial ON The ISSUE OF INSANITY. PETITIONER WAS deNied The OPPorTUNITY To ANY Arguement AgainST The DeaTh PeNalTy. WAS NOT To Show miTigaTing CircumSTances. Allowed

The State GeNerated, Created, developed AND OFFered Severe CONTradicTIONS ON PETITIONER'S State of mind AT The Time OF OFFENSE.

This Court Should Demand That Texas Obey IT'S Law And Prove IT's Case Against Petitioner without denying Petitioner due process.

The OPPORTUNITY TO AN INSANITY DEFENSE. The OPPORTUNITY To Show mitigating Circumstances, And any ~~AND~~ AND All Argument against The Death Penalty.

The Will OF The People To Impose The Death Penalty IN This Case WAS based ON Prejudice, IGNORANCE, AND Irrationalization.
Their minds, Wills And Emotions were wrongly INFLUENCED by Trickery, mockery, Deception And Personal SKILLS OF The Prosecutor OF The STATE OF Texas To do So.

This Court has held IN LOCKETT VS OHIO 438 U.S. 586 (1978) Bell VS Ohio 438 U.S. 637 (1978) Held That Placing RESTRICTION ON A DEFENDANT'S RIGHT TO Show mitigating Circumstances IN A Death penalty case IS UNCONSTITUTIONAL.

Chambers VS STATE 9 TX Cr APP 1978 568 S.W. 2d 313 The COURT OF Criminal Appeals ruled That OPINION TESTIMONY based ON REFERENCE TO DOCUMENTS OR REPORTS CONCERNING The OFFENSE WAS NOT INADMISSIBLE IF The PSYCHIATRIST had Thoroughly examined The APPELLANT And diagnosed him ON The basis OF That examination before He Read Those Reports.

Doctors Testimony Contradicting Their Reports had No Probated Value.

The District Attorney's Files Are heresay And Should NOT be Considered For Any Reason by This Court.

The Testimony Of The Doctors Totally Produced by The State Of Texas For Purpose Of Securing A Death Sentence Violates The Above Laws. Violates The 5Th, 6th 8Th and 14Th Amendments Right.

This Court Should Grant Certiorari To Consider Whether The Opinion Of The Court Of Criminal Appeals Of Texas In Affirming Petitioner's Conviction And Death Sentence Violates His 5Th 6Th, 8Th And 14Th Amendments Rights?

This Portion Of The Facts Of The Case will Deal with:

The Trial Court's Error, Admitted by Texas Court Of Criminal Appeals, That The Trial Court did err When He overruled Petitioner's Objection To Prejudice Remarks and Mockery Of His Self Representation by Dr. Grigson A State's Witness before The Jury.

Doctor Grigson Told The Jury That The Petitioner WAS Trying To Manipulate Them, He Is enjoying This, This Feeds His ego, He Is Trying To Act Like A Lawyer. He WANTS you To Think He He Is Sick.

Vol IX S. F. P 1818 Line 1 Through 1820 Line 9

keepIN mind That The State OF Texas, The Trial Jude, NOT PETITIONER Requested That PETITIONER be examined by Dr. Grigson.

NO Report Filed With The Court TO SUPPORT ANY TeSTimony From Him Through The State OF Texas

Texas Court of Criminal Appeals Admits This FACT IN IT'S OPINION

IT Appears That The Prosecutor Sole INTENT Was TO USE Doctor Grigson's TeSTimony To Prejudice The Jury AND DENY PETITIONER The Right TO A Fair Trial.

UNder FareTTa VS CALiFornia 422 U.S. 806 45 L Ed 2d 562 95 S. CT 2525 A DEFENDANT has A Right To REPRESENT himself AT Trial and ON APPeal.

UNder Texas laws, Texas Code OF Criminal Procedure ArTicle 1.05, Texas CONSTITUTION Art 1 Sec 10 Accused have A Right TO A Fair Trial by AN IMPaRTial Jury AN d The RigHT TO REPRESENT himself.

The Trial became a mockery, Absurd and Empty Show Staring The Prosecutor and Dr. GrigSON Who had NO Respect For PETITIONER'S Right or The Law he supposely DeFend.

IN OPINION OF Texas Court OF Criminal APPeals This WAS harmless error, yet PETITIONER MUST Pay The ULTimate Price OF His LiFe For A Trial OF mockery That DeNied Him FUNDAMENTAL FAirNess.

At That point Petitioner's Right To Defend himself IN The Trial was worthless, A Pleading That had NO Legal Leg To Stand.

Bruce VS Estelle 483 F 2d 103 (5th Cir 1973)

The Court Stated "Highly Prejudical Remarks" UTTered by The Prosecutor jeapordize The Jury's deliberative Process AN hence INFringe upon an accused Right To a Fair hearing ON The merits OF The case.

Gardner VS Florida 430 U.S. 349, 358
ANY Decision To IMpose The DeaTh PenalTy MUST be, AND APpear TO be based ON Reason RaTher Than Caprice Or emotion. This IS Vital IMPorTance TO The DeFendanT.

This Court Should GranT CerTiorari TO CONsider Whether The Texas Court OF Criminal APPeals OPINION IN AFFirming PeTitioner's SeNTence OF DeaTh AND CONVICTION VIOlaTes His 5Th, 6Th 8Th AND 14 AmendmenTs RighTs?

PeTitioner's Plea

INVidious discrimination GND erroneous INdividually Prejudice Standard For The PeTitioner AND CONcealed IN The Court's OPINION Though OPEN ON Court's Records OF This Case.

IT Shows That PsyChiaTrisT Dr PENNal AND PsyChologisT Dr Wall both had PersonAl INTerest IN The OUTcome OF This Case. BoTh Changed Their FINding INFluenced By The Prosecution.

IF Good Will existed and good Faith had existed The accused petitioner would have been further evaluated.

The Sole Purpose of The State was To Deceive The will of The people, TO prejudice The will of The people TO kill petitioner, To create an outrage, To produce a Grievous Feelings IN The will of The people TO a Severity That Death only Is a proper punishment.

ON The Top of The confession, IT Reads, Before Question of me by ANY Police officer. The Record Is extremely Clear That Seventeen hours of INterrogation. The Body SAY NO promises or persuasion used. The Record clearly proves otherwise. Testimony, Exhibit, and certainty.

The Sole Purpose of The State was Corrupt, TAINTED with vice of sin, Evil, contaminated With INdignity.

This Court Should Grant Certiorari TO Consider Whether The Texas Court of Criminal Appeals OPINION IN AFFirming petitioner's CONVICTION and SENTENCE OF Death violates His 5, 6, 8, AND 14Th Amendment Rights?

CONCLUSION

Petitioner Prays That a writ ISSUE TO Review The Judgement OF The Texas Court Of Criminal Appeals.

Respectfully Submitted

Samuel C. Hawkins
Ellis unit #590
Huntsville Texas 77340

Court's Opinion Affirming Petitioner's Conviction And Death Sentence January 14, 1981

Letter From The Court Denying Rehearing and Granting a 30 day Stay Of The mandate February 4, 1981
ON File A-658

Cetificate Of Service

I Certify That a True and exact Copy Of This Petition For writ Of Certiorari Is Mailed Pre Paid Postage, Return Receipt Requested To The 3/10/81
Attorney' General's Office
Supreme Court Building
P. O. Box 12548
Austin Texas 78711

Certified Slip
P-1 24 26 383
3/10/81

Samuel C. Hawkins
Ellis unit #590
Huntsville Texas
77340

APPENDIX "A"

80-6514

SAMUEL HAWKINS, Appellant

NO. 62,534 v. - - - Appeal from TRAVIS County

THE STATE OF TEXAS, Appellee

OPINION ON STATE'S
MOTION FOR REHEARING

Our opinion on original submission is withdrawn. In it, responsive to contentions made in an amicus curiae brief, the Court reversed the judgment of conviction and remanded the cause for a new trial on the twin conclusions that neither the standard for waiver of counsel nor the standard for selfrepresentation were satisfied in the trial court. This the Court was authorized to do in the interest of justice by Article 40.09, §13, V.A.C.C.P.

The opinion and judgment of the Court have at once received support and have come under heavy attack, according to the lights of respective interested parties. But none is more vehement than appellant, who is undertaking to represent himself on this appeal.[1/] In his "motion and answer" to the State's motion for rehearing, appellant expressly agrees that rehearing should be granted and insists that the Court "reverse its decision and rehear this case in full compliance with Article 40.09 C.C.P. and rule on the pro se brief" on the merits of his appeal.[2/] Indeed, in another response appellant asserts that by not considering the grounds of

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1/ We note that immediately after the verdict of the jury on punishment was received and the trial court pronounced judgment, the court offered to have court-appointed trial counsel handle the appeal or assist appellant in doing so, but was told by appellant:

> "I would, Judge, as I have indicated earlier, I would like to file my own appeal."

The trial court responded, "That will be fine." See, in this regard, Webb v. State, 533 S.W.2d 780, 786 (Tex.Cr.App. 1976).

2/ In that answer appellant informs us that he did not know the amicus curiae intended to argue any grounds of error other than the seventeen raised by him in his pro se brief; in effect, appellant disavows the contentions advanced by amicus curiae that were addressed on original submission.

error in his pro se brief according to Article 37.071, [3] V.A.C.C.P., we are denying him due process of law.

The Court is thus confronted with a demand that rehearing be granted by an appellant whose exercise of selfrepresentation beginning in September 1978 has been seriously questioned. However, those questions and the conclusions reached on original submission are based on a record of proceedings that were held more than two years ago. We judicially know that on or about October 1, 1980, after the opinion in this case on original submission, this Court granted a motion of appellant for leave to proceed pro se in our Cause No. 65,000 [4] after a hearing in the trial court, ordered by the Court for that purpose, established conclusively that appellant is well advised as to his right to counsel and the dangers and disadvantages of selfrepresentation, and knowingly and intelligently waived the right and insisted on risking the potential detriment of representing himself. [5] So, applying the rationale of Faretta

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[3] His reference is to §(f) of Article 37.071, supra, which provides for automatic review by this Court of every judgment of conviction and sentence of death.

[4] Also a capital murder case pending on appeal, the parties are the same - albeit a different District Attorney - and to the extent that the matter of selfrepresentation on appeal has been resolved we deem it a related proceeding for purposes of judicial notice. Ex parte Paprskar, 573 S.W.2d 525, 527, n. 1 (Tex.Cr.App. 1978); Ex parte Flores, 537 S.W.2d 458, 460, n. 3 (Tex.Cr.App. 1976); Huffman v. State, 479 S.W.2d 62, 68 (Tex.Cr.App. 1972).

[5] In sum appellant testified that he did not want the lawyers appointed to represent him on appeal to do so; that he did not want any lawyer to represent him on appeal; that he did not want a lawyer to assist him on a stand-by basis; that he wanted the briefs filed by his appointed lawyers to be stricken; that he knew under the Sixth Amendment he had the right to effective assistance of counsel and that he wished to waive that right; that he is a 36 year old, high school graduate; that he has represented himself in an aggravated rape case tried in Harris County and in the instant capital murder case tried in Travis County; that if his time in

Footnote 5 continued -

v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), as was done in Webb v. State, 533 S.W.2d 780, 784 (Tex.Cr.App. 1976), we are satisfied that before this Court appellant has effectively asserted his right to selfrepresentation on appeal in this cause.

What is presented, then, are a State's motion for rehearing asserting that the findings and conclusions of the Court are erroneous and an appellant's motion and answer in propria persona that, in effect, concedes the errors asserted by the State. A confession of error by the State, though uncommon, is ordinarily accepted, e.g., Miller v. State, 460 S.W.2d 427 (Tex.Cr.App. 1970); Arsiaga v. State, 372 S.W.2d 538 (Tex.Cr.App. 1963); Crain v. State, 253 S.W.2d 867 (Tex.Cr.App. 1953); Ramiriz v. State, 153 Tex.Cr.R. 206, 233 S.W.2d 307 (1950); Anderson v. State, 154 Tex. Cr.R. 372, 227 S.W.2d 815 (1950), and there would appear to be no impediment to an appellant's doing the same, if so advised. Certainly, an appellant may deliberately waive possible grounds of error simply by not asserting them in his appellate brief,

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Footnote 5 continued -

court on all three of these cases were added up, the total would be about ten weeks; that during these trials he filed pretrial motions, made objections, etc., at trial, filed motions for new trial, and filed briefs; that he knew the appellate procedure set forth in Article 40.09 (and he recited it accurately); that he has a Code of Criminal Procedure and a Penal Code and has access at all times to law books at T.D.C.; that he has never been declared insane or incompetent by any court and he makes no claim that he is insane or incompetent now; that no one has threatened or persuaded him to represent himself; that he is aware of the dangers and disadvantages of representing himself, but voluntarily chooses to represent himself even if it is to his own detriment; that he knows how to prepare a brief (and he explained how he would point out the errors in the record, cite his authorities and make his arguments); and that he was aware that he might make a mistake which would later harm him if he went into federal court (such as inadvertently waiving some point).

cf. Article 40.09, §9,[6] or by failing to brief one that is assigned, e.g., Williams v. State, 504 S.W.2d 477 (Tex.Cr.App. 1974). It occurs to us that an appellant may still agree with the State that a certain issue is, or is not, in the case, Downes v. State, 22 Tex.App. 393, 3 S.W. 242, 243[7] (Ct.App. 1886), and do so effectively by asserting his agreement in a pro se pleading.

Accordingly, the State's motion for rehearing is granted, and we shall now address such of appellant's seventeen grounds of error as may be required.[8] In a cluster are grounds raising questions about the soundness and reliability of certain psychiatric testimony, but the one that concerns us most is his ground of error number nine. It reads: "Court erred when overruling Appellant's objection to the State witness Dr. Grigson." This broad assertion must be put in perspective.

The offense in the case at bar is alleged to have occurred February 3, 1976. Appellant was arrested the morning of June 30,

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[6] The brief of appellant shall "set forth separately each ground of error of which the defendant desires to complain on appeal. . ." (All emphasis is supplied throughout by the writer of this opinion unless otherwise indicated.)

[7] "This case was submitted to us upon a single question, by an agreement in writing signed by counsel for both parties, and by said agreement all other questions that might arise in the case were expressly waived. * * * We decline to consider and determine this [other] question, in view of the aforesaid agreement of the parties. . ."

[8] While appellant has a right to have the Court consider every ground of error properly raised by him, he is not entitled to a discussion of each question in the written opinion of the Court. Fox v. State, 145 Tex.Cr.R. 71, 165 S.W.2d 733, 734 (1942). Article 44.24, V.A.C.C.P., only requires that the opinion set forth "the reason for such decision" in the case. Lindsey v. State, ____S.W.2d____(Tex.Cr.App., No. 59,128, delivered October 22, 1980, Motion for Leave to File denied December 23, 1980).

1977, and held without bail.[9] Indictment was returned July 28, 1977.[10] August 8, 1977, on motion of appellant through court-appointed attorney, the trial court ordered Dr. Hugh A. Pennal, an Amarillo psychiatrist, "to determine the mental competency" of appellant to stand trial. Reports from Dr. Pennal to the trial court are dated December 29, 1977,[11] January 31, 1978[12] and February 8, 1978.[13] In June 1978 appellant filed a pro se motion

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[9] In his ground of error sixteen appellant asserts the State did not prove probable cause for his warrantless arrest but, though appellant touched on it in questioning Detective Bill Eaton during a pretrial hearing on motion to suppress his confession, our search of the record does not reveal that the matter was ever made an issue in the case. Indeed, the witness we understand was the senior arresting officer, Lt. Darrell Garner, was not asked a single question about the arrest. Nothing is presented for review.

[10] Appellant complains in his second ground of error that the State did not serve notice that it would seek the death penalty, but he relies on the former provisions of Article 1.14, V.A.C.C.P. that have been legislatively removed. See Batten v. State, 533 S.W.2d 788, 793 (Tex.Cr.App. 1976).

[11] Dr. Pennal recounts the "rather extensive work-up" and states that his conclusion is that appellant "represents, as a diagnostic entity, a classic case of true paranoia."

[12] After completing additional study, Dr. Pennal reports that appellant is competent to stand trial, was not psychotic at the time of the offense and was then sane.

[13] This last report explains the use of the term "paranoia." His first report was meant to connote "extreme suspiciousness," and goes on to note that his additional study reveals that "many sociopathic traits are present."

for hearing on his competency to stand trial, and on October 3 gave written notice that the issue of insanity at the time of the offense may be raised in the case. At a pretrial hearing October 12, 1978 appellant announced his waiver of proceeding on the competency motion but the cautious trial court permitted the prosecutor to develop testimony from Dr. Pennal that in his opinion appellant was completely competent to stand trial. At the conclusion of the hearing the trial court ruled that "there is no evidence to support a finding of incompetency," and followed that oral pronouncement with a written order dated October 17, 1978, denying a jury determination of the matter. Thus, more than a month before the trial began that present competency was not an issue in the case was clearly ruled and understood.[14/]

[14/] Later that understanding was underscored when in presenting his insanity defense appellant posed a question to a psychologist who had examined him and the following occurred:

> "Q: Okay, in your opinion, Dr. Wall, am I suffering from a mental disease now?
>
> (District Attorney) It's not a matter at issue, Your Honor. That matter at issue is whether he was suffering from a mental disease or the appropriate issue is whether or not he was legally insane back on February the 3rd, 1976.
>
> THE COURT: I sustain the objection."

As made clear in the opinion on original submission, the matter of appellant representing himself came up several times before a patient trial judge, and finally that right was accorded to him, to be exercised with or without assistance of a court-appointed "standby" attorney as appellant desired. November 27, 1978 the case was called for trial,[15] and after it had been assembled the trial court propounded to the panel of prospective jurors what was characterized as "certain principles of law applicable to this case." Inter alia, the trial court alluded to the fact that appellant was representing himself, outlined the law in that respect, mentioned admonishments given appellant and concluded by instructing the panel:

> "You will not consider the Defendant's having elected to act as his own trial Counsel as any evidence for or against the Defendant or the State in this trial."[16]

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[15] Venue for trial of the case had been transferred from Potter County to Travis County. Before announcing ready for trial appellant made an oral motion for appointment of a Travis County practitioner to assist in jury selection. Ascertaining that appellant was still insisting on representing himself and with appointed "standby" counsel present, the trial court denied the motion. By ground of error five appellant asserts error in this, citing cases that hold appointment of counsel is required at every stage of a criminal proceeding where substantial rights might be affected. However, appellant had waived his right to counsel, and the refusal of the trial court to grant a form of hybrid representation was not error. See Landers v. State, 550 S.W.2d 272, 278 (Tex.Cr.App. 1977); DeRusse v. State, 579 S.W.2d 224, 237 (Tex.Cr.App. 1979).

[16] Immediately preceding the quoted instruction the jury had been told:

> "Defendant representing self. You should know that the Defendant in this case has chosen voluntarily to act as his own Defense Attorney and Mr. Seldon Hale, a practicing attorney in Amarillo, Texas, has been appointed by me to remain standing by during the trial in the event that the Defendant at some point decides to change his election to act as his own Counsel and to exercise his right to be represented by Counsel appointed for him.
>
> It is the law that a person on trial has the right to an appointed lawyer if he is indigent, but it is also the right of the person on trial to act as his own Counsel if he insists on doing so, as the Defendant, Samuel Hawkins, has insisted in this case. His election to do so was voluntarily made after I had admonished him that he would have to observe the same rules of evidence, procedure and law that a licensed attorney acting as a trial counsel would have to observe. And I may necessarily in the course of the trial make legal rulings holding him to these legal standards despite his lack of formal legal training."

Each juror who was ultimately selected was thoroughly qualified by the prosecuting attorney on the matter of appellant representing himself.[17/] Appellant often followed up with one or

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17/ Examination of the juror first accepted, Susan Cavazos, is typical:

"Q: Now, as the Judge told you when you were here as a group earlier this morning, the Defendant in this case is named Sam Hawkins, he is seated to my left. And he has insisted on his right, and he has an absolute Constitutional right, to represent himself as his own Counsel in this trial. And as the Judge told you this morning, he has a right to do that.

A Lawyer has been appointed, that is seated there by him, to standby andgive any advice that is asked for.

Do you have any disagreement with the law that - permits a Defendant to represent himself if he insists on it?

A: No, sir.

Q: You think that law is a good law and all right --

A: If he wants to, that's his business.

Q: Okay. Now, during the course of the trial I may make an objection from time to time or I may respond to some objection that the Defendant might make on his own behalf. And you heard the Judge, this morning, tell you that he was going to hold the Defendant to the rules of evidence and courtroom procedure just as though he were a licensed lawyer, and he would have to follow those rules.

Do you have any disagreement with that, do you think that's a fair enough thing if he is going to represent himself?

A: That's fair.

Q: It really, Miss Cavazos, it kind of worries me, because being a licensed myself [sic], I'm afraid that you or anybody else on the jury might think I'm bullying him because -- I mean, I guess he can't help not having a law license, but I can't help having one as we sit here today. Would you hold that against me or against the State that I represent --

A: No, sir, he had an opportunity to get a lawyer and he still can.

Q: And you wouldn't hold it against me, the fact that I do have some legal training, while he does not have any formal legal training?

A: No, sir."

two questions on the point.[18]

Before the State commenced to present its case, then, two ground rules for conduct of the trial were explicit: one, present competency of appellant was not at issue and, two, the fact that appellant was representing himself was not a matter for jury consideration.

The State called its first witness December 4, 1978. He and the others presented by the State during its case in chief testified to certain facts surrounding the offense as well as the subsequent arrest of and statement by appellant concerning it, the final witness being a pathologist who gave his opinion as to the cause of death of the victim.

In presenting his defense, appellant testified[19] and then[20] called Richard Lee Wall, PhD, a Clinical Psychologist, who had interviewed and tested him January 16 and 17, 1978. His initial diagnosis was paranoia, but about three weeks later, after assaying other information, Dr. Wall changed it from paranoia to the less severe "paranoid condition."[21] At the end of Dr. Wall's testimony appellant

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[18] Thus he asked Cavazos whether the fact that he was representing himself affected her in any way; when she asked for amplication, the question and her answer were:

> "Q: Would it make you think I'm committing a stupid act, and agree with the District Attorney that I should be found guilty because of that?
>
> A: No, sir."

[19] Recounting a long history of the consequences of what he termed "an uncontrollable sex drive," appellant recalled earlier efforts at "therapy" in another state. On cross examination at first he made no answer to a question as to whether he had a mental disease but, upon being prodded, he gave a rambling reply that ended with his characterizing that "drive" as a mental defect.

[20] Appellant put an Amarillo television newsman on the stand to have him testify to a series of interviews he had with appellant that were later broadcast, but on objection by the State the trial court ruled out the proposed testimony; we find no error in that ruling.

[21] Dr. Wall told the jury, on cross examination, that he did not know whether appellant was psychotic on February 3, 1976, and that he had "no way of knowing" whether the condition he diagnosed "could reasonably be expected to have changed" between the time of his examination and "the present time."

rested his case.

Dr. Grigson was called by the State as its first rebuttal witness.[22/] Ground of error number nine, though inartfully drawn, is clarified by a paraphrase of portions of the record that are specifically cited, viz:

> "Q: Would you tell the Jury your impression of that document which was delivered to a clinical psychologist named Dr. Wall in connection with his examination of the Defendant?
>
> A: Yes. This is -- if you read it, you find that this is an absolute manipulation on Mr. Hawkins' part, to say, 'See, I must be sick, something is wrong with me.'
>
> Now, what he is doing, as most sociopaths will do, they will make minor concessions such as he doesn't mind telling you about his horrible sexual drive and all of the terrible things which he has done, but what he hopes to gain from this is a major concession.
>
> The con job is, 'You have got to see how crazy I am and how sick I am. You can't consider finding me guilty because of what I am.'
>
> But this is simply manipulation on his part.
>
> MR. HAWKINS: Judge, I object to Dr. Grigson's opinion because he only saw that for a few minutes ago (sic).
>
> And as I shared with the Court earlier, I had a subpoena form to back up everything that is in there, and the State and the Court were the ones that refused the subpoena form which I have here to prove these situations.
>
> So Dr. Grigson doesn't have the authority to say this isn't true.
>
> THE COURT: I will overrule your objection.
>
> You can proceed.
>
> Q: (By Mr. Curtis) Doctor, as you observed the Defendant just at that time, was he displaying some evidence of anxiety as he stood up and made that objection?
>
> A: Well, he, one, is trying to get attention and play like an attorney. This feeds his ego.

22/ In view of appellant's equivocation, note 16, ante, since Dr. Wall disclaimed any opinion about appellant's mental condition at the time of the instant offense, see note 18, ante, there really was not much to rebut.

> MR. HAWKINS: Judge, I still object to Dr. Grigson's opinion as to what feeds my ego. He should deal with the examination on this case, Judge, with reference to the evaluation which he took of me, and that's the context of his testimony (sic).
>
> THE COURT: I will overrule your objection."

Dr. Grigson had examined appellant only one time - January 13, 1978, in the Potter County Jail. Our search of the record for his authority to make the examination has produced none, but apparently it was in connection with yet another case pending against appellant in Hutchinson County. We have already observed that during this contemporaneous period appellant was being tested, examined and evaluated by Dr. Pennal through appointment by the trial court.

Dr. Grigson testified that he conducted a mental status examination of appellant, describing to the jury its five parts, and that he came to his now familiar diagnosis of sociopathic personality disorder.[23/] He expressed the opinion that appellant was not suffering from a mental illness or disease either at the time of the examination or anytime prior to it. After elaborating on characteristics he finds in the sociopathic personality, he described appellant as manipulative, then was presented Defendant's Exhibit 1 and gave testimony over objections that appellant cites in support of his ground of error and we have set out ante.

As Dr. Grigson was presenting his views and opinions on direct examination appellant made no objection until Dr. Grigson stated his "impression" of the Defendant's Exhibit 1. When that objection was overruled the District Attorney then pointed out to Dr. Grigson to what appellant, acting as his own attorney, had just done: "Doctor, as you observed the Defendant just at that time. . . as he stood up and made that objection. . ." Thus prompted, Dr. Grigson undertook to inform the jury that appellant "is trying to get attention and play like an attorney" for it "feeds his ego."

23/ See, e.g., Smith v. State, 540 S.W.2d 693, 696 (Tex.Cr. App. 1976), certiorari denied 340 U.S. 922 (1977); habeas corpus relief granted in Smith v. Estelle, 445 F.Supp. 647 (ND Tex. 1977) affirmed 602 F.2d 699 (1979) certiorari granted, cause argued, decision pending; Livingston v. State, 542 S.W.2d 655, 661 (Tex. Cr.App. 1976); Moore v. State, 542 S.W.2d 664, 676 (Tex.Cr.App. 1976); Gholson v. State, 542 S.W.2d 395, 399-401 (Tex.Cr.App. 1976); Chambers v. State, 568 S.W.2d 313, 325-326 (Tex.Cr.App. 1978); see generally, "Witness for the Prosecution," DMagazine, June 1980, 131 ff.

Appellant now asserts, "Yet the court allowed the State's witness to do the very thing he told the jury not to do," and contends admitting the testimony violated his rights under the Sixth Amendment[24] to the Constitution of the United States, Article I, §10[25] of the Constitution of the State of Texas and Article 1.05,[26] V.A.C.C.P.

> ". . . The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.' Illinois v. Allen, 397 U.S. 337, 350-351 (Brennan, J., concurring)."

Thus wrote the Supreme Court in Faretta v. California, 422 U.S. 806, 834, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975). We believe neither the State nor Dr. Grigson honored appellant's personal choice to represent himself. Rather, they denigrated his decision and mocked him for making and carrying it out, and in the doing weakened the carefully structured protection that until that moment had been accorded the constitutional right of appellant to conduct his own defense.

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[24] The Sixth Amendment provides the right of an accused to be informed of the accusation against him, to be confronted with witnesses, to have compulsory process to obtain witnesses and to have assistance of counsel "for his defense." From this is derived the correlative independent constitutional right to defend himself. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); Brignon v. State, 399 S.W.2d 810, 812 (Tex.Cr.App. 1966).

[25] In pertinent part §10 of our Bill of Rights provides that an accused "shall have the right of being heard by himself or by counsel, or both." However, the language is not to be taken literally, as Landers v. State, 550 S.W.2d 272, 275 ff. (Tex.Cr. App. 1977), teaches; see also Phillips v. State, 604 S.W.2d 904, 907 (Tex.Cr.App. 1979).

[26] Like §10 of the Bill of Rights, Article 1.05 also speaks of "the right of being heard by himself, or counsel, or both," but see note 25, ante.

It is plain that the preliminary instructions given by the trial court in this respect to the panel of prospective jurors, pursuant to Article 35.17, V.A.C.C.P., were intended and designed to present appellant in that capacity and protect both the accused and the State from any adverse inferences being drawn from the fact that appellant was representing himself. Just as the panel was told they were not to consider his failure to testify should that be his election,[27] so also they were not to consider his having elected to act as his own trial counsel for or against appellant or the State "in this trial." The questions by the State and the answers by Dr. Grigson thus put before the jury the very matter they had been instructed by the trial court they were not to consider, and had been excluded on objection by the State when appellant broached the subject with Dr. Wall, see note 14 ante.

Years ago in Waters v. State, 91 Tex.Cr.R. 592, 241 S.W. 496, 499 (1922) it was written:

> ". . . The trial of causes involving life and liberty to the citizen, whatever may be his standing or estate, whether he be of high or low degree, the procedure and result involve the most serious matters. Such trials are not to be made mere opportunities for verbal sword-play between competing counsel, nor should the fair judgment of the jury be affected or influenced by aught save the consideration of the testimony and its effect, under the law as presented."

Certainly in this State selfrepresentation is not new, Webb v. State, 533 S.W.2d 780, 783 (Tex.Cr.App. 1976), and from considerations that have caused the Court to deny a right to "hybrid representation," Landers v. State, supra, at 278, Phillips v. State, 604 S.W.2d 904, 907 (Tex.Cr.App. 1979), Webb v. State, supra, at 784, and to require the trial judge to make an accused fully aware that "he will be on his own in a complex area where

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27/ And, of course, it is a well settled constitutional principle by judicial decision and implemented by statutory law that the failure of an accused to testify in his own behalf shall not be taken as a circumstance against him, "nor shall the same be alluded to or commented on by counsel in the cause," Article 38.08, V.A.C.C.P. See Stafford v. State, 67 S.W.2d 287 (Tex.Cr.App. 1934).

experience and professional training are greatly desired," Trevino v. State, 555 S.W.2d 750, 751 (Tex.Cr.App. 1977), and that "he will not be granted any special consideration because of his lack of formal training in law," Geeslin v. State, 600 S.W.2d 309, 314 (Tex.Cr.App. 1980), it follows that though not an attorney an accused is expected to conduct himself like one to the extent of his ability to do so.

In Williams v. State, 549 S.W.2d 183, 189 (Tex.Cr.App. 1977), following Faretta v. California, supra, at n. 46,[28/] the Court stated, "When an accused elects to represent himself he cannot complain that the quality of his own defense amounted to a denial of effective assistance of counsel." Also, the Court has observed that a selfdefending accused "has no right to ask for a reversal because he alienated the jury while doing so," Rasberry v. State, 535 S.W.2d 871, 873 (Tex.Cr.App. 1976). However, neither the Supreme Court nor this Court has ever indicated that an accused who is exercising his independent constitutional right to represent himself is fair game for the State and its witnesses. Indeed, if the right is to have any practical meaning, its actual exercise must be honored "out of 'that respect for the individual which is the lifeblood of the law'" as much as the initial decision. Making sport of appellant for voicing the very first objection to testimony of Dr. Grigson is the antithesis of deference to the determination by an accused to represent himself demanded by the Supreme Court of the United States in Faretta. Such an accused is entitled to give his best effort to be effective counsel for himself without demeaning characterizations or innuendos that would or should not be permitted against a licensed trial counsel. Cook v. State, 537 S.W.2d 258, 261 (Tex.Cr.App. 1976) and cases cited

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28/ "The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules or procedural and substantive law. Thus, whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel'."

therein; see Ford v. State, 314 S.W.2d 101, 102 (Tex.Cr.App. 1958): "Lawsuits should be tried upon the issues raised and submitted to the jury and not upon collateral issues such as personal conflicts between counsel."[29] As the Court remarked in Franklin v. State, 41 Tex.Cr.R. 21, 51 S.W. 951 (1899):

> ". . . We would observe here that counsel has a right at all times during the progress of the case, in proper manner, to reserve a bill of exceptions to any action of the court or counsel deemed improper, and he has a right at all times in taking his bill of exceptions to be treated in a respectful manner. No doubt the purpose of the district attorney was to belittle his exception. This course of practice should not be allowed." [30]

Accordingly, we hold that where competency to stand trial is not an issue and the accused is exercising his independent constitutional right to conduct his own defense it is error of constitutional dimension for the prosecutor or a witness to comment adversely concerning the mental attitude of the accused as he is exercising that right.

Nevertheless, though the exchange between the prosecutor and Dr. Grigson and the adverse ruling by the trial court were erroneous and occurred in a capital case, the question remains whether the errors are harmless beyond a reasonable doubt. Schneble v. Florida,

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[29] This observation came in the context of finding reversible error in overruling objections to improper questions propounded by the prosecutor to defense counsel, whom he had called as a witness, "which were calculated to leave the impression with the jury that appellant's counsel had been guilty of some trick or device in the selection of the jury."

[30] In Waters v. State, 91 Tex.Cr.R. 592, 241 S.W. 496, 499 (1922) the Court similarly urged that "there is no need for the attorneys for the people to resort to such methods" as the making of sidebar remarks and "to belittle the objections and complaints made on behalf of appellant."

405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972);[31] Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 340 (1969);[32] Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).[33] That determination is for this Court in the first instance, Foster v. California, 394 U.S. 440, 444, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969), and we now turn to make it.

The bare bones of the case presented by the State are described in the opinion on original submission. Appellant "in essence admitted the commission of the offense" of killing a twelve year old girl during the course of kidnapping her from her home and thereafter attempting to, if not actually accomplishing, rape. As well as a confession produced by the State there was an abundance of circumstantial evidence that appellant did just what

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[31] A violation of Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d (1968), was found harmless by the Supreme Court.

[32] Overwhelming evidence of guilt may relegate constitutional error to condition of harmlessness. The error we now treat occurred, it is to be remembered, on rebuttal during the guilt-innocence phase of the trial.

[33] In a "reasonably strong 'circumstantial web of evidence' against petitioners" in which "honest, fair-minded jurors might well have brought in not-guilty verdicts," a "machine-gun repetition of a denial of constitutional rights (prosecutorial comments on failure to testify), designed and calculated to make petitioner's version of the evidence worthless" cannot be considered harmless, 386 U.S. at 25-26.

he said in his confession he did.[34/]

Also before Dr. Grigson gave his testimony, appellant, thoroughly cautioned and warned by the trial court that on material matters he was waiving his constitutional right against self-incrimination by taking the stand, did so and testified in narrative form at some length - spurning the option of having his "standby attorney" pose pertinent questions to him. Beginning with his early childhood, appellant related that his "sex drive" was strong, such that he masterbated so regularly that there were times when his penis became "raw or swollen twice its size." We allude to this earthy testimony of appellant since he regards such manifestation of his early "sex drive" as indicating the "mental defect" that continued to preclude selfcontrol of his sexual behavior toward others generally and certain victims particularly. The details of that continuing course of misbehavior we will pretermit; suffice to say that he narrated a history of juvenile indecency with his minor sisters and attempted buggery, followed by incidents as an adult of public lewdness, a rape in

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[34/] ". . . I just wanted to get her away from the house so she would'nt [sic] scream. She couldn't have seen the truck that I was in because I put a stocking over her eyes that I had taken out of the front room of the house. * * * I took her to my truck, and she got in. We then drove off. I got about three miles or so down the road and the girl started screaming and kicking. I tried to calm her down and when I couldn't I got excited. I noticed a piece of steel in the floor board of the truck. This piece of metal was about a 12 inch square. I picked the piece of steel up and hit the girl in the left side of the face. The girl fell over. When the girl fell over, I hit her again. I don't remember how many times I hit her but I kept hitting her with the piece of steel. The girls [sic] head was bleeding very much, so I got the pillow case off of a pillow that I had in the truck, and I wrapped it over the girls [sic] head to keep the blood from getting on the seat. * * * I came to a little gutter bridge in the road. I stopped the truck, and drug her out, and put her under the bridge. I then left her under the bridge and went back to my job. I knew that the girl was dead when I hit her the first time because she fell over and didn't move. . . ."

Denver, Colorado, an entry with intent to rape in Oklahoma City, Oklahoma, and "the same problems" for a year in Jacksonville, Florida - all prior to moving to the Amarillo area. There, appellant was, as he summed it up, "arrested on some 13 rapes. . . and two murders as a result of this sex drive which didn't ever change." Appellant concluded his personal presentation by summarizing his conversations with several Amarillo police officers and detectives, in which he "shared with them my problem," subsequently confessed to committing the instant offense and others, and bringing himself "to the point pretty much where I am now with this problem." On cross-examination appellant acknowledged that he had been convicted of the more particularized offenses he had recounted, and evasively conceded to killing the victim in the case at bar.

Appellant then called Dr. Wall and through him developed much of the same history, winding up the examination with introduction of a seven page handwritten account of the same history signed by appellant. It is Defendant's Exhibit 1, which when shown to Dr. Grigson for his "impression" gave rise to the disputed exchange.

Thus, the jury had before it appellant's own live testimony of his "problems," the history given Dr. Wall and a personally written report that appellant himself had prepared (for consideration by Dr. Wall in his examination) and on his own initiative introduced as an exhibit in presenting his defense. Not only is evidence of his guilt of the offense charged overwhelming, but also we must conclude "that the 'minds of an average jury' would not have found the State's case significantly less persuasive" had the testimony of Dr. Grigson as to appellant's "ego trip" in representing himself been excluded, Schneble v. Florida, supra, 405 U.S. at 432.

Therefore, the ninth ground of error presents error that is harmless.

Ground of error one contends that his written confession was not voluntarily made by appellant, in that it is the product of unkept promises by his interrogators. The court conducted a far-ranging hearing on a pro se motion to suppress the confession, alleging inter alia that promises to obtain "mental help" for him caused appellant to begin to discuss his "problems" and several offenses he had committed and persuaded him to sign the written confession.

We note at the outset that the statement recounting the instant offense was but one of a trio of confessions to separate crimes purportedly made by appellant during the morning of July 1, 1977, the day following his arrest. This statement, as well as the other two, reads just above his signature, "I am giving this statement to Det. LaFavers of the Amarillo Police Dept. without any threats or promises given to me by him or anyone else of that Dept. I have read the above statement and it is true and correct to the best of my knowledge." Detective LaFavers testified that, in the presence of and with the assistance of two other officers, he interviewed appellant for some three hours before the first statement, the one in this case, was typed by him and read and signed by appellant; during that period of time, according to LaFavers, appellant appeared to be acting voluntarily, no threats or promises were made and there was no force of any sort used against him during the interview. The interview, or at least portions of it, were recorded and in our record are three substantially similar but still strikingly different transcriptions of the

recording.[35] Before being confronted with any of them, LaFavers dissembled with respect to whether he had made certain statements that appellant translated into "promises,"[36] but he did generalize his own thoughts concerning them, viz:

> "My intention was not to promise you anything at that time, I don't feel as if it came across that way, . . . I didn't at the time feel and I don't now feel that you interpreted it that way."

The trial court heard the testimony, indicated that the transcriptions had been read, reviewed and compared and apparently agreed with LaFavers, for it pronounced the finding that "beyond a reasonable doubt the confessions which were introduced were voluntarily made." Subsequently, the oral ruling was reduced to written particularized findings and conclusions, two of which are:

> "The defendant. . . was not coerced into making any of the said statements by any force, threats, persuasion, or promises or any other improper influence.
>
> The statements given were reduced to writing; the defendant read them completely and signed them of his free will."

35/ Two begin identically with appellant saying, "I was probably about 9 or 10 years old," whereas the one proffered by appellant has him adverting to earlier remarks: "I was talking about, a minute or two minutes ago, my daddy. . . The recording machine was being operated by Captain of Detectives E. N. Smith who, though testifying to related matters, recounted little of what preceded the opening remarks of appellant. Elsewhere it appears that appellant had been questioned unsuccessfully by other officers throughout the afternoon and evening of the day of his arrest. At about 11:00 p.m. Deputy Sheriff Isaiah Garrett, a black like appellant, visited with him alone. Being cross-examined by appellant, Garrett denied telling appellant that he had a sickness and "we're going to put you in the hospital." Rather, Garrett testified, he told appellant, "You have a problem," without characterizing it, and "You need to tell the truth and get this over with." (When Captain Smith testified before the jury, he answered affirmatively when asked by appellant, "Do you remember that the suggestion to give the confession was to Sergeant Garrett?") Presumably Garrett then summoned the other officers, the recording device was then turned on and appellant began a monologue covering two pages of the transcription before being interrupted by LaFavers.

36/ Drawing from a transcription of the recorded interview in his possession, appellant cross-examined LaFavers about making such statements as "It [appellant's sex drive] is something that you yourself can't hold yourself at fault for, it is something that we will help you with, we will do that," "[W]e recognize the fact that you need help, and you are seeking that help now, psychological and psychiatric help, and I think the Courts will recognize that fact" and "You have the opportunity to help a lot of other people. So I think you are making the right choice, you're relieving yourself and you're relieving a lot of people. . ." These statements do appear to have been made, but the questions posed them completely out of context.

However much appellant disputed the testimonial and documentary evidence that support those findings,[37] the trial court "is the sole judge of the weight and credibility of the witnesses," Harville v. State, 591 S.W.2d 864, 867 (Tex.Cr.App. 1979), and, believing or disbelieving all or any part of the testimony of any witness, Hughes v. State, 562 S.W.2d 857, 863 (Tex.Cr.App. 1978), resultant findings of the trial judge will be upheld if supported by the evidence, Myre v. State, 545 S.W.2d 820, 824 (Tex.Cr.App. 1977).

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[37] Appellant's attitude, reflected by his own testimony, is that he was "dealing with people that were tricking me, that were lying to me, that were deceiving me, promising me help when their sole intention was to file capital murder on me and give me the death penalty," while he was "trying. . . to get the help I need." As we read the transcriptions, they simply do not support that position. Before his monologue was interrupted by LaFavers, according to the defense version of the recording, appellant had already moved from his childhood problems through his inability to satisfy his wife to admitting the rape in Denver and an attempted rape, concluding, "Sometimes I would leave home with good intentions, but some force would turn me around. For the last two weeks or so. . . I didn't want to live that way any longer and I still don't." Then LaFavers made sympathetic remarks, including the willingness to try to help with the problem, and was expressing an understanding of appellant's "situation" when appellant interjected his own thought that there are "two personalities in me." Building on that LaFavers opined that the better personality could overcome "this other mind that keeps dominating" the body, and that just recognizing and admitting the need for help is "half the battle," so that the "crisis that you are going to have to eventually go through" is "happening now" and appellant ought to think about helping other people and himself; with that LaFavers said, "There's no sense in fighting us or us fighting you or batting our heads any more," and suggested that "we go back to this period when it started here. . . and you go ahead and fill me in." Responding, "Okay," appellant began to answer some general questions and shortly more specific ones about past crimes, phrased by LaFavers from a "book of reports" to "refresh" appellant's memory. At last LaFavers requested appellant "to go back to the girl in Panhandle," the case at bar, and in answer to questions appellant related in detail how he committed the offense. In much the same way appellant described another homicide in Borger. He was then offered a soft drink and a piece of pie and, while waiting for them to be brought, according to the transcription, LaFavers spelled out appellant's name as he began to type in the confession form.

There is ample evidence to support the findings of the trial court.[38/] We adhere to the settled rule that a confession must be free and voluntary and is not to be "obtained by any direct or implied promises however slight, nor by the exertion of any improper influence," Roberts v. State, 545 S.W.2d 157, 161 (Tex.Cr. App. 1977). Still, even if, contrary to the usual procedure on review, the various statements made by LaFavers are viewed in a light most favorable to appellant, they do not constitute promises to obtain "mental help" in exchange for a confession. So far as this record shows, it was appellant who first introduced to his interrogators a long history of abnormal sexual behavior to account for his most recent persistently bizarre misbehavior and violent criminal acts and conduct. Naturally LaFavers and the other officers professed understanding and empathy when appellant expressed so much self-concern that he "didn't want to live that way any longer and I still don't" - not to promise anything but to get to the point of the interrogation.[39/] In the circumstances of this case, we find that kind of role-playing was neither improper nor did it induce or persuade appellant to confess his guilt.

38/ We note that in trial LaFavers acknowledged making nearly every statement attributed to him by the transcription, taking pains at times to explain his true intent and purpose was other than promising anything, and a properly charged jury found the confession by appellant was "freely and voluntarily made. . . without compulsion or persuasion." That finding is also supported by the evidence. Ground of error seventeen, contending otherwise, is overruled.

39/ As LaFavers explained to appellant before the jury, "I didn't want to, so to speak, lose you at that point, and you to talk about different things, so I would agree with you on points rather than try to agitate you by disagreeing."

See Roberts v. State, supra, at 161. Thus, we further conclude that the evidence supports the two findings of the trial court, excerpted ante, and overrule ground of error one. Harville v. State, 591 S.W.2d 864, 867 (Tex.Cr.App. 1979); Burks v. State, 583 S.W.2d 389, 393 (Tex.Cr.App. 1979); Hammett v. State, 578 S.W.2d 699, 711-712 (Tex.Cr.App. 1979); Hughes v. State, 562 S.W.2d 857, 863 (Tex.Cr.App. 1978).

Grounds of error eleven and twelve assert, respectively, that the trial court allowed the State to suppress evidence favorable to appellant and that assessment of the death penalty is contrary to law. However, his real complaints concern remarks by the prosecutor that appellant says presented "a false picture" to the jury[40/] and the recanting of their initial impressions of his mental condition by Dr. Wall, the psychologist, and Dr. Pennal, the psychiatrist, as well as the limited examination conducted by Dr. Grigson to base his testimony. "This kind of madness by the court and prosecutor, with extreme attempts to suppress evidence,[41/] and paint a false picture to the jury," he argues,

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40/ One part of the "false picture" was introduction of personal items - a pillowcase, towel, and the like - taken from the home of appellant by officers armed with his written consent to search. His objection to their being admitted, also claimed as error in ground ten, is that the officer did not receipt for the items. The contention is utterly without merit. The authority he cites, old Article 18.20, V.A.C.C.P., no longer exists.

41/ This is probably an allusion to the fact that certain subpoenas obtained by appellant were not served, or at least a return of service was not made. The complaint is made in more detail in ground of error three. However, the trial court, upon learning that the applications for subpoenas were not made until during voir dire, warned appellant that they might be too late, offered to do all possible to see they were served, later directed standby counsel to assist in expediting appearances and generally extended utmost cooperation. The simple fact of the matter is, as the trial court expressly found in the record, that appellant did not exercise due diligence in this respect, see, e.g., Denny v. State, 558 S.W.2d 467, 470 (Tex.Cr.App. 1977), nor have the record reflect that the prospective testimony would be material to his defense. This ground of error is overruled as, for much the same reasons, is ground of error four complaining of refusing a continuance on account of the missing witnesses and records. See Jones v. State, 501 S.W.2d 677, 679 (Tex.Cr.App. 1973).

"resulted in an illegal sentence [sic] of death to the appellant."

Every record reference cited by appellant has been carefully read and considered against his complaints and argument, and it is our judgment that there is no error in any of this. The jury was made aware of the changed diagnoses and the reasons therefor; it was the exclusive judge of the credibility of the witnesses and the weight to be given their testimony. As judges of a reviewing court we cannot say the jury was misled in performing its exclusive function, to the detriment of appellant. Grounds of error eleven and twelve are overruled.

In another cluster of grounds of error, thirteen, fourteen and fifteen, appellant contends the State did not prove "knowingly" and "intentionally," as alleged in the indictment, and "deliberately," as submitted in special issue one pursuant to Article 37.071(b)(1), V.A.C.C.P. But the thrust of his similar contention in each ground of error is not to an evidentiary insufficiency of his culpable mental states and his deliberateness. Rather, citing V.T.C.A. Penal Code, §§8.01[42] and 19.06,[43] and asserting that the State's testimony about his state of mind was "in violation" of Article 46.02, V.A.C.C.P.;[44]

42/ Section 8.01 provides that insanity at the time of the offense is an affirmative defense, and it defines "mental disease or defect."

43/ Section 19.06 dictates that in prosecutions for murder or voluntary manslaughter admissible evidence includes "all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense."

44/ Article 46.02, supra, prescribes procedures for determining and consequences of finding incompetency to stand trial - a question that was answered in the case at bar by unimpeachable pretrial proceedings; see discussion under ground of error nine, ante.

appellant would have it that the matter of his sanity at the time of the offense "is still unresolved." With this we do not agree, for with a full exposition of available testimony and documentary evidence before it and properly charged on the issue by the trial court, the jury had to find in order to convict appellant, and patently did find, that his affirmative defense of insanity was not supported by a preponderance of the evidence, a burden that the law imposes on appellant. Graham v. State, 566 S.W.2d 941, 943, 948-953 (Tex.Cr.App. 1978) is particularly instructive in these respects, and from the record of what the jury heard and saw we are unable to hold this to be one of those rare cases in which the findings by the jury on the sanity issue must be overturned, Graham v. State, supra, at 953. Grounds of error thirteen, fourteen and fifteen are overruled.

Citing to us Bounds v. Smith, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d (1977), appellant complains in his sixth ground of error that the trial court erred in denying him access to a law library. In the context of a convicted inmate of a state correctional institution, the Supreme Court held that a prisoner's right to access to courts requires provision of an adequate law library or adequate assistance of persons trained in the law. Through a layman confined with him in the Potter County Jail, appellant addressed to the trial judge a written request for access to a law library that is dated September 28, 1978 and bears a timestamp of October 3, 1978. The request was rejected by written order reciting that it was considered on the latter date and denied because the assisting layman "has no standing" in the cause involving appellant.[45/] Be that as it may, during this period of time appellant

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45/ But see Johnson v. Avery, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969), holding invalid a statute prohibiting aid from a fellow inmate in the absence of an adequate substitute.

was represented by court-appointed counsel who prepared and filed motions in his behalf, participated in pretrial hearings to the extent appellant, then pondering selfrepresentation, would permit and generally rendered aid and assistance ordinarily expected of a criminal law practitioner. Not until a full pretrial hearing held October 6, 1978, did the trial court determine and order that appellant had waived his right to court-appoinced counsel and, concomitantly, would be permitted to defend himself - with such assistance of standby counsel as he desired. Thus, even if the rationale of Bounds v. Smith, supra, be applicable to a pre-trial detainee in a local jail - and we need not decide that point - still the ruling of the trial court was correct for appellant then had adequate assistance of an attorney trained in the law.

Subsequently appellant was transferred from Potter County to the Travis County Jail; an order directing the Sheriff to do so is dated October 17, 1978, and a paper purportedly executed by appellant in Travis County shows his date of commitment in that jail as October 18, 1978. November 27, 1978, with scheduled voir dire about to commence, appellant moved orally for access to a law library, to which the trial judge responded, "I will have Mr. Hale [standby court-appointed counsel] obtain and we will assist you in obtaining anything that you specifically request. . . [and] . . . if you don't know exactly what you need but you want him to find what is available on a certain point of law then I will request him to do that research for you and to bring you, either through Xerox copies or through actual books, the items you request."

Appellant did not protest that procedure and now does not contend the program planned by the trial judge was not implemented.

Indeed, in arguing under this point he states, "Travis County does have a prison inmate library in the County jail. . . [and] it is a full volume library," and that he was aided by the librarian, whose name is given. We perceive no error in the initial ruling by the trial court in Potter County nor the manner of providing access to legal materials in Travis County. Ground of error six is overruled.

In his seventh ground of error appellant complains that the trial court overruled his objection to what he sees as an attempt by the prosecutor to prejudice verniremembers by the phraseology of an introductory remark to the law concerning an affirmative defense of insanity. He claims a reoccurrence over his objection "several times," but only directs us to a single incident, examination of the eleventh venire person, Betty Cowie, viz:

> "[Prosecutor]: The Defendant has exercised another right that any defendant in any criminal case has; he has given notice that intends to claim the defense of insanity as a defense in an effort to be found not guilty of the indictment against him.
>
> MR. HAWKINS: Judge, I object to that, his quotation that I claim to use the insanity in order to not be found guilty of an offense.
>
> THE COURT: I will overrule the objection." 46/

46/ During his own examination of Cowie, appellant and she got into an exchange over whether, as appellant would have it, "a violation of the law is not a crime when a person commits it while he is insane;" her thought was that "it is a violation whether you're insane or not." The ensuing verbal flap was calmed when the trial judge pronounced the difficulty "just a problem in semantics." The Court has stated the view expressed by Cowie in strikingly similar terms:

> ". . . Insanity is a defense that excuses a defendant from punishment because of his state of mind at the time of the commission of the act. . . . It does not mean that the conduct. . . does not constitute an offense."

Pesch v. State, 524 S.W.2d 209, 301 (Tex.Cr.App. 1975). As more recently pointed out in Graham v. State, supra, at 948, "The purpose of the insanity defense issue is to determine whether the accused should be held responsible for the crime, or whether his mental condition will excuse holding him responsible." We have dwelled on this matter in order to demonstrate the basic misconception that colors appellant's approach to and his analysis of the asserted ground of error.

Not being pointed to pages in the record where, according to appellant, the State similarly addressed five persons who ultimately were seated as jurors, or even their names, for resolution of the problem we will not assume arguendo that such is the state of the record.[47/] As to them, nothing is presented for review. Love v. State, 533 S.W.2d 6, 9-10 (Tex.Cr.App. 1975); Chappell v. State, 519 S.W.2d 453, 457 (Tex.Cr.App. 1975); Dabbs v. State, 507 S.W.2d 567, 569 (Tex.Cr.App. 1974); Reynolds v. State, 506 S.W.2d 864, 866, 867 (Tex.Cr.App. 1974). We may not take venireperson Cowie as a typical example, see Davis v. State, 529 S.W.2d 547, 548 (Tex. Cr.App. 1975), for before being excused for cause she made it plain that even should appellant prove his insanity as defined by law she would still convict him. Thus, as to her at least, appellant was helped, not harmed, by the insinuating phrasing of its question by the State. Ground of error seven is overruled.

The grounds of error presented by appellant do not reveal any error harmful enough to require reversal of his conviction.

The State's motion for rehearing is granted and the judgment is affirmed.

CLINTON, Judge

EN BANC

(Delivered January 14, 1981)
McCormick, J., not participating

47/ The voir dire examination was of thirty three prospective jurors; it consumes one thousand pages in five separate volumes of the record before us. That appellant is able accurately to cite volume, page and line numbers of the record in reference to the Cowie exchange and other transactions about which he complains under the balance of his ground of errors evidences his access to the whole record. Even the mandatory review of conviction in a capital case does not excuse a failure to comply with important rules for briefing grounds of error in this Court, e.g., Article 40.04, §9, that are applicable to an appellant acting pro se as well as one represented by counsel. Williams v. State, 549 S.W.2d 183, 186-187 (Tex.Cr.App. 1977).

Appendix "B"

SAMUEL HAWKINS, Appellant

NO. 62,534 v. - - - Appeal from TRAVIS County

THE STATE OF TEXAS, Appellee

O P I N I O N

This is an appeal from a conviction for capital murder. The jury answered affirmatively the special issues submitted pursuant to Article 37.071, Vernon's Ann.C.C.P. Accordingly, the punishment was assessed at death.

Appellant was tried in Travis County on a change of venue from Potter County. This case presents a rather novel factual situation. This capital murder defendant, who had had past dealings with the criminal justice system, chose to represent himself at his capital murder trial. Standby counsel was appointed to assist appellant in the conduct of the trial. Counsel sat with appellant throughout each phase of the trial and consulted with appellant from time to time. However, the record reflects that appellant himself conducted the voir dire examination of the jury, examined and cross-examined witnesses, made objections to evidence offered by the State, testified in his own behalf, submitted proposed jury charges, and argued his case to the jury.

The State's evidence showed that appellant murdered a 12 year old girl during the course of kidnapping and attempting to rape her. Appellant's defense was insanity. He, in essence, admitted the commission of the offense, which was substantiated by a confession which he had made earlier, but claimed that he was unable to conform his conduct to the requirements of the law. See V.T.C.A. Penal Code, Section 8.01.

Appellant also represents himself on appeal. However in a brief filed by amicus curiae, [1] the contention is advanced that

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[1] The amicus curiae, granted leave to file a brief in appellant's behalf, represent the Texas Civil Liberties Union.

the trial court erred in permitting appellant to represent himself without 1) determining that appellant made an intelligent and voluntary waiver of counsel and, 2) admonishing appellant sufficiently as to the dangers and disadvantages of self-representation. Under the authority provided by this Court, we are constrained to agree.

The record reflects that the trial court appointed four different lawyers to represent appellant at different times, with appellant refusing the services of each. Appellant, who the record indicates had recently been on trial for other crimes, thought that none of the attorneys appointed by the court would work in his best interest. Over the course of several weeks, prior to trial, the trial court and appellant had continuing conversations concerning the issue of legal representation of appellant. Relevant portions of those discussions are as follows:

> "THE COURT: ... If you want to represent yourself, and understand, Mr. Hawkins, I do not think that that is in your best interest, I think that you are not qualified, your education does not qualify you to represent yourself. But if you are going to insist on representing yourself, and I know you have been over this in prior trials with prior Judges and you understand that right, I will allow you to do so.... we might as well cover this, even though you are not a lawyer, I'm going to expect you to conduct yourself in the same way that a lawyer would. And you will be required to ask questions in the same manner that a lawyer would and I will not tolerate any kind of disruptive behavior.
>
> * * *
>
> [Appellant] ... I'm not silly enough to think that I'm competent to represent myself, I don't think that for a second, I never thought that. But I know, as far as [the appointed attorneys] representing me, the competency is equal.

The trial court inquired of appellant whether he would accept representation by counsel if the court appointed still another lawyer. Appellant indicated that he would, and the trial court

did so. However, at the next hearing, after new counsel had been appointed, the discussions continued.

> "THE COURT: ... When we proceed, either you are going to represent yourself or Mr. Hale is going to represent you. And if you are going to persist in standing up and making your own objections and making your own statements, then you will have made the decision to represent yourself.
>
> THE DEFENDANT: Judge, I'm not going to take just a flat passive role in this case when its for my life, if that's what you expect me to do, I'm not going to do it.
>
> * * *
>
> THE COURT: ... if you want to represent yourself you can. But you are not going to have your cake and eat it too. You are either going to have Mr. Hale represent you or you are going to represent yourself. And I am not going to hear two sets of motions and two sets of objections on every point that comes up."

Later, the trial court convened a special hearing to finally resolve the question of whether appellant would represent himself. The record reflects that appellant told the court that he had decided to represent himself. The trial court rejected his request that he be allowed to be represented by an attorney and act as co-counsel, participating in the trial. Although the court would not accept this hybrid representation, it did indicate to appellant that standby counsel would be available to advise appellant or to take over representation, should appellant change his mind during the course of the trial. The court admonished him:

> "... either you have got to take on the representation or you have got to give Mr.Hale the authority to take on the representation and consent to that and be bound by his decisions.
>
> Also, I want you to understand, and I think you do if you did read those cases,[2/] that

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[2/] The record reflects that the trial court gave appellant some cases on this subject to read; the record, however, does not reveal what cases these were.

> should you decide to represent yourself that you will be bound by the law and so you will be bound by the procedural rules that we have in court, and you will be bound by the, what we call 'substantive law,' you will be bound by the law that exists in the United States and in the State of Texas regarding the criminal offense and criminal trials."

After this, the court entered an order permitting appellant to represent himself.

The Sixth Amendment to the Constitution of the United States and Article 1, Section 10 of the Texas Constitution provide that a defendant in a criminal trial has the right to the assistance of counsel. This right to counsel may be waived and the defendant may choose to represent himself at trial. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 561 (1975). However, as the Supreme Court stated in Faretta:

> "When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must 'knowingly and intelligently' forego those relinquished benefits. Johnson v. Zerbst, 304 U.S. at 464-465, 58 S.Ct. at 1023 [citation omitted]. Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' Adams v. United States ex rel. McCann, 317 U.S., at 279, 63 S.Ct., at 242."

A waiver of the right to counsel will not be "lightly inferred" and the courts will indulge every reasonable presumption against the validity of such a waiver. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Geeslin v. State, ___ S.W.2d ___, (No. 58,451, delivered May 7, 1980); Trevino v. State, 555 S.W.2d 750 (Tex.Cr.App. 1977). The prosecution has a heavy burden to demonstrate that a waiver of constitutional rights was made intelligently, knowingly and voluntarily, particularly when that right was the right to

counsel. Geeslin v. State, supra; Trevino v. State, supra; Robles v. State, 577 S.W.2d 699 (Tex.Cr.App. 1979); Barbour v. State, 551 S.W.2d 371 (Tex.Cr.App. 1977).

In determining whether a valid waiver of counsel has been made, Faretta, supra, requires, and this Court has repeatedly stressed that: (1) the defendant must make a knowing and intelligent waiver and (2) the defendant must be made aware of "the dangers and disadvantages of self-representation. Faretta v. California, 422 U.S. at 836, 95 S.Ct. at 2541; Goodman v. State, 591 S.W.2d 498 (Tex.Cr.App. 1980); Renfro v. State, 586 S.W.2d 496 (Tex.Cr.App. 1979). These are two distinct requirements and the trial court must be satisfied as to their existence before allowing a defendant to represent himself.

This Court has previously held that in order to determine whether a defendant's waiver is intelligent and voluntary, the trial court should inquire into the defendant's background, age, education and experience.[3/] Geeslin v. State, supra; Renfro v. State, supra; Lisney v. State, 574 S.W.2d 144 (Tex. Cr.App. 1978). The record should reflect such an inquiry and it should further show that the defendant was informed as to his right to counsel and that he affirmatively waived this right, intending to represent himself alone. Webb v. State, 533 S.W.2d 780 (Tex.Cr.App. 1976); Thomas v. State, 550 S.W.2d 64 (Tex.Cr.App. 1977). The trial court is not obligated to assess a defendant's technical legal knowledge and such knowledge is

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3/ We note that these factors have been treated in some cases to be mandatory inquiries. See, e.g., Geeslin v. State, ___ S.W.2d ___ (No. 58,451, delivered May 7, 1980); Renfro v. State, 586 S.W.2d 496 (Tex.Cr.App. 1979). They are not mandatory inquiries, in and of themselves. Rather, they are only some factors, which, among others, may be proper inquiry for the trial court in determining whether a defendant is knowingly and intelligently waiving his right to counsel.

not relevant to an assessment of his knowing exercise of the right to defend himself. Faretta v. California, supra. Rather, the defendant must show sufficient intelligence to demonstrate a capacity to waive his right to counsel and the ability to appreciate the practical disadvantage he will confront in representing himself. Trevino v. State, supra.

Pursuant to the mandate of Faretta, the trial court is also obligated to insure that the defendant waiving his right to counsel is fully aware of the dangers and disadvantages of self-representation. In Webb v. State, supra, this Court stated, "The trial court should... admonish an accused who desires to represent himself regarding the wisdom and the practical consequences of that desire." The facts demonstrating the defendant's awareness of such must affirmatively appear in the record. Webb v. State, supra. The defendant should be made aware of the general nature of the offense he is charged with and with the possible penalties that may be imposed. Geeslin v. State, supra; Goodman v. State, supra. The defendant should be made aware that there are technical rules of evidence and procedure that he will be obligated to comply with and that he will not be granted any special consideration because of his lack of formal training in law. In short, the defendant must be aware that "he will be on his own in a complex area." Geeslin v. State, supra; Trevino v. State, supra.

In the instant case, we must conclude that the trial court's admonitions to appellant were not sufficient to meet either the standard for waiver of counsel or the standard enunciated in Faretta. See Geeslin v. State, supra; Goodman v. State, supra; Barbour v. State, supra. Since the record does not affirmatively reflect appellant's intelligent, voluntary and knowing waiver of representation by counsel, and that he was aware of the dangers and disadvantages of self-representation, the case must be remanded for a new trial.

We are not unmindful that an accused's right to represent himself cannot be manipulated by him so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice. Robles v. State, 577 S.W.2d 699 (Tex.Cr.App. 1979); Webb v. State, supra. Indeed, the trial court here was confronted with a very difficult defendant, who rejected lawyer after lawyer appointed to represent him. However, it is nevertheless the duty of the trial court to insure that a defendant, even an uncooperative one, understands well what he stands to lose by the rejection of counsel and the decision to proceed in his own behalf.

It has been suggested that a capital murder defendant, who is facing the possibility of a death sentence, can never validly waive counsel and represent himself. This is not true. Faretta v. California, supra, held that the right of self-representation is embodied in the Sixth Amendment to the Constitution. Indeed, the rationale of Faretta was based upon a recognition that,

> "The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.' [citation omitted]" [Emphasis added] Faretta v. California, 422 U.S. at 835, 95 S.Ct. at 2540, 2541.

Since Faretta was premised upon the recognition of respect for individual choice, the defendant himself bearing the personal consequences of a criminal conviction, what greater interest can the State have in protecting this choice than in a situation where the defendant faces the ultimate punishment.

The suggestion is also made that a defendant, who chooses to advance a defense of insanity, can never be competent to waive counsel and represent himself. Neither is this true.

A defendant, competent to stand trial, who is able to make a knowing, voluntary and intelligent choice to waive counsel, and who is made aware of the dangers he faces in proceeding on his own, is guaranteed the right of self-representation by Faretta, regardless of which defense he chooses to assert.

Because of the failure of the record to reflect a proper waiver of counsel and an informed decision about self-representation, the judgment is reversed and the cause remanded for a new trial.

W. C. DAVIS, Judge

Delivered September 10, 1980
En Banc

Douglas, J. and T. Davis, J. dissent

NO. 80-6514

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1980

SAMUEL CHRISTOPHER HAWKINS,

Petitioner

V.

STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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ATTORNEYS IN CHARGE FOR RESPONDENT

QUESTIONS PRESENTED

I. WAS PETITIONER'S CONFESSION VOLUNTARY?

II. DID PETITONER HAVE A FULL AND FAIR TRIAL ON HIS DEFENSE OF INSANITY?

III. WAS A COMMENT ON PETITIONER'S SELF-REPRESENTATION HARMLESS BEYOND A REASONABLE DOUBT?

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent herein, and, by and through its Attorney General, Mark White, files this its Brief in Opposition.

OPINION BELOW

Petitioner's conviction for capital murder was originally reversed on September 10, 1980. However, on January 14, 1981, the state's motion for rehearing, in which Petitioner joined, was granted; the opinion on original submission was withdrawn, and the judgment was affirmed. Hawkins v. State, __ S.W.2d __ (Tex.Crim.App. 1981)(Both opinions are attached as Respondent's Appendix A.)

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioner bases his claims upon the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

On July 28, 1977, Petitioner was indicted in Potter County, Texas, for the offense of capital murder. After numerous pre-trial hearings beginning in September, 1978, venue was changed to Travis County, Texas, on the court's motion, due to extensive local publicity of the case. During pre-trial hearings, Petitioner expressed his intent to waive the assistance of counsel and to invoke his right to represent himself. See, Faretta v. California, 422 U.S. 806 (1975). The trial judge ascertained that Petitioner's waiver of counsel was knowing and voluntary and that Petitioner was aware of the dangers of self-representation, [1/] but retained standby counsel to assist Petitioner.

Trial began on November 27, 1978. The record reflects that in Amarillo, Texas, in the early morning hours of February 3, 1976, Petitioner went looking for someone to rape. He found an unlocked door at a house and entered. Inside, he discovered twelve year old Rhonda Keyes, whom he abducted from the house. Once inside his car, Petitioner began driving out of the county. According to Petitioner's confession, Rhonda became upset, and Petitioner then began beating her with a piece of steel. After beating her to death, he dumped the girl's body into a culvert. Rhonda's body was discovered a week later. Her hands had been tied and she had been beaten severely about the head, face, chest and abdomen. Numerous intact sperm were found in her vagina. Besides Petitioner's voluntary confession to the murder,

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1/ See, Respondent's Appendix A at 2, and footnote 5.

other physical evidence was found in his possession which linked him to the offense.

Petitioner conducted his own defense and, after admonishments by the court and his standby counsel, he presented a defense of insanity. The gist of his defense was that he had uncontrollable "sex urges" which compelled him to commit numerous rapes in order to satisfy it, and that he would kill if necessary in order to satisfy his sex urges. He recounted for the jury a history of uncontrollable sex urges which, during childhood, manifested themselves in uncontrollable masturbation and the sexual abuse of his sisters. He admitted to the commission of numerous rapes in other states, and stated that he had been apprehended for thirteen other rapes and two additional murders around Amarillo. Petitioner testified that he was not responsible for this conduct because his sex drive was uncontrollable.

Petitioner also presented the testimony of a psychologist, Dr. Wall, who had examined Petitioner extensively. Dr. Wall had first diagnosed Petitioner as paranoid psychotic in that Petitioner had a delusional system that he, a black, was specially appointed to take vengeance on his white oppressors; according to Petitioner, the best way to "get to white man was through his women," which presumably was the reason for the repeated brutal rapes which Petitioner committed. After further study of Petitioner's case, however, Dr. Wall changed his diagnosis, and concluded that Petitioner simply had a paranoid state, a milder form of paranoia in which a delusional system can be set aside. In conjunction with his examination of Dr. Wall, Petitioner introduced into evidence a handwritten statement which he had made for the purpose of describing his purported insanity. In this statement, Petitioner detailed his history of uncontrollable masturbation, sexual abuse of his sisters, bestiality, and rapes,

concluding with a statement that he simply was unable to conform his conduct to the law.

Petitioner also introduced into evidence a report made by another psychiatrist, Dr. Pennal, which related Petitioner's statements that he had been responsible for the murders of four females, innumerable rapes, and fifty (50) fires around Amarillo.

To rebut Petitioner's claim that he was insane, the state presented the testimony of two psychiatrists who had examined Petitioner. Both testified that Petitioner was suffering from no mental disease or defect. Dr. Pennal had first diagnosed Petitioner as a "classic case of true paranoia;" however, after further observation of Petitioner and a review of the state's file in the instant rape-murder, Dr. Pennal concluded that Petitioner had "pulled the wool over his [Dr. Pennal's] eyes."

After additional evidence was offered, the jury rejected Petitioner's defense of insanity and found him guilty of capital murder. At the punishment phase of the trial, the state re-offered the evidence presented at the guilt-innocence phase, and presented the testimony of a woman whom Petitioner had tied and gagged, raped repeatedly, stabbed fifteen (15) times and left for dead in her home. Petitioner also testified in his own behalf. The jury thereafter found as true the special issues presented pursuant to Article 37.071, Vernon's Ann. C. C. P. and, accordingly, punishment was assessed at death.

Petitioner also refused the assistance of counsel on appeal and instead filed a pro se appellate brief raising some seventeen (17) grounds of error. An amicus curiae brief was filed in Petitioner's behalf by the Texas Civil Liberties Union, raising claims that Petitioner had not made

a knowing and intelligent waiver of counsel or been sufficiently admonished as to the dangers and disadvantages of self-representation. The Court of Criminal Appeals, based upon state law interpretation of the applicable constitutional standards, agreed and reversed the conviction. A motion for rehearing was filed by the state, and joined in by Petitioner, who claimed that he did indeed intelligently, knowingly, and voluntarily waive counsel and that he did indeed receive proper admonishments and was aware of the dangers and disadvantages of self-representation. (Respondent's Appendix B.) Petitioner vehemently urged the Court to grant the motion for rehearing and reinstate the conviction, and then proceed to consider the grounds raised in his pro se brief. The Court granted rehearing. Petitioner filed additional motions urging the court to deny further intervention of the amicus curiae, stating, "I am aware of this fact that this is a death sentence case. As much as Gilmore in Utah and Bishop in Nevada who both chose execution rather than appeals. I too choose to appeal my case pro se successfully or die. No other way." (Respondent's Exhibit C.)

In the intervening time, Petitioner had also perfected an appeal from another capital murder conviction, No. 65000, received in Lubbock County, in which he demanded to dismiss his appellate attorneys and proceed pro se. As mandated by the appellate court, a hearing on this matter was held in the trial court. According to the Court of Criminal Appeals, as judicially noted in the opinion affirming the instant conviction, this hearing "established conclusively that appellant is well advised as to his right to counsel and the dangers and disadvantages of self-representation, and knowingly and intelligently waived the right and insisted on risking the potential detriment of representing himself."

(See, Respondent's Appendix A, Opinion on Rehearing at 2 and footnote 5). In its opinion on motion for rehearing, the court withdrew the prior opinion, ruled upon Petitioner's pro se grounds of error, and affirmed the conviction.

SUMMARY OF THE ARGUMENT

Petitioner's confession was freely and voluntarily given. After a hearing, the trial court found that the confession was voluntary and not the product of promises of benefit or inducements. As the state appellate court found, the record fully supports the trial court's findings.

Petitioner had a full and fair trial on his defense of insanity. Evidence of Petitioner's sanity, offered only after he presented a defense of insanity, clearly was probative of the issue which Petitioner raised at trial. His contention that he was prevented from presenting mitigating evidence is unsupported by the record.

A comment by a witness on Petitioner's self-representation is harmless beyond a reasonable doubt. Evidence of Petitioner's guilt of the offense of capital murder was overwhelming. The evidence that Petitioner was sane was also overwhelming. Any error in the admission of this statement could not have affected the jury's determinations.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that a review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Petitioner has advanced no special or important reason in this case and none exists. 2/

2/ It appears that the Texas Civil Liberties Union has filed an amicus curiae brief in support of the petition for certiorari, urging that Petitioner should not have

II.

PETITIONER'S CONFESSION WAS VOLUNTARY

Petitioner contends that his written confession was not voluntarily given, in that it was the product of promises by the officers to obtain "mental help" for him for his problems with his sex urges. An extensive pre-trial hearing was held, [3/] at which the testimony of the officers who took the confession was presented. [4/] The evidence was undisputed that Petitioner had been fully and completely advised of his rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), prior to making any statement. The officers testified that they made no such inducements or promises to Petitioner. Petitioner's contrary contentions were rejected by the trial court and the Court of Criminal Appeals. The statements to which Petitioner points as showing promises of benefit in exchange for a confession are taken out of context. In the context in which the statements were made, if at all, [5/] the statements were expressions of sympathy or encouragement for Petitioner to continue his lengthy recitation concerning his criminal activity and attempts to calm Petitioner when he became emotionally distraught when relating

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(Footnote 2, continued)

been allowed to represent himself. Respondent objects to this filing, as Petitioner has previously vehemently objected to the intervention of this party on his behalf. Further, the brief fails to comply with Rule 36 of the Rules of the Supreme Court in that no written consent of the parties was sought or obtained, it is untimely in any event, and the brief exceeds the page limitation, and Respondent is unable to ascertain if Petitioner has been served with a copy, as no proof of service appears.

3/ See Jackson v. Denno, 378 U.S. 368 (1964).

4/ The confession in the instant case was but one of three confessions which were taken at the same time.

5/ The record reflects that only some of the statements to which Petitioner alludes were, in fact, made.

his past behavior. As both the trial and appellate courts found, the statements were neither improper nor did they induce or persuade Petitioner to confess his guilt. The record as a whole does not support Petitioner's claim.

III.

PETITIONER HAD A FULL AND FAIR TRIAL ON HIS DEFENSE OF INSANITY

Petitioner advances two contentions relating to the insanity defense which he presented at trial. First, he contends that the testimony of the two psychiatrists who testified to rebut his claim of insanity had no probative value, as both doctors had initally diagnosed Petitioner as having a serious mental defect, but after further inquiry or study, both concluded otherwise. Each doctor testified fully as to his initial conclusion and subsequent diagnosis. Dr. Wall, called to testify by Petitioner, was examined fully concerning his changed diagnosis of Petitioner. Dr. Pennal, called to testify by the state, was cross-examined thoroughly by Petitioner as to the reasons he changed his initial diagnosis. The jurors were not misled as Petitioner contends. Petitioner's contention is clearly meritless.

Petitioner next contends that he was prevented from presenting to the jury mitigating circumstances or evidence concerning his state of mind at the time of the commission of the offense. The record reflects that this claim is patently false. A review of the record shows that Petitioner was given every opportunity to present any evidence relevant to the issues at trial. Petitioner's contrary contention simply is not supported by the record.

IV.

A COMMENT ON PETITIONER'S SELF-REPRESENTATION WAS HARMLESS BEYOND A REASONABLE DOUBT.

The record reflects that during the examination of a psychiatrist called by the state to rebut Petitioner's defense of insanity, the witness made a comment that Petitioner's self-representation at trial "[fed] his ego." The Texas Court of Criminal Appeals correctly held that a comment on Petitioner's exercise of his right of self-representation is, on the facts of this case, clearly harmless beyond a reasonable doubt. See, Chapman v. California, 386 U.S. 18 (1967).

First, Petitioner's guilt of the offense of capital murder was overwhelming, at the least. In addition to his voluntary written confession, Petitioner himself testified and related a bizarre history of uncontrollable sex urges, which he alleged caused him to commit crimes like the sexually motivated murder of the victim in the instant case. He related his history of deviant behavior and criminal convictions for sex offenses, and evasively conceded the instant murder. The state also introduced additional circumstantial evidence which strongly linked Petitioner to the instant offense. Second, the only evidence to support Petitioner's claim that he was insane was his own testimony to that effect; witnesses presented by both Petitioner and the state all agreed that, while Petitioner was capable of anti-social acts, he had no mental disease or defect which rendered him insane. 6/ The burden was upon Petitioner to prove his insanity by a preponderance of the evidence, V.T.C.A. Penal Code, Sec. 2.04. Still, the evidence was overwhelming that

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6/ See, V.T.C.A. Penal Code, Sec. 8.01.

Petitioner was not insane. The state appellate court correctly found "that the minds of an average jury 'would not have found the State's case significantly less persuasive'" had this statement by the witness been excluded.

WHEREFORE, PREMISES CONSIDERED, Respondent respectfully prays that the petition for writ of certiorari be denied.

Respectfully submitted,
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RESPONDENT'S APPENDIX A

SAMUEL HAWKINS, Appellant

NO. 62,534 v. - - - Appeal from TRAVIS County

THE STATE OF TEXAS, Appellee

OPINION ON STATE'S
MOTION FOR REHEARING

Our opinion on original submission is withdrawn. In it, responsive to contentions made in an amicus curiae brief, the Court reversed the judgment of conviction and remanded the cause for a new trial on the twin conclusions that neither the standard for waiver of counsel nor the standard for selfrepresentation were satisfied in the trial court. This the Court was authorized to do in the interest of justice by Article 40.09, §13, V.A.C.C.P.

The opinion and judgment of the Court have at once received support and have come under heavy attack, according to the lights of respective interested parties. But none is more vehement than appellant, who is undertaking to represent himself on this appeal.[1/] In his "motion and answer" to the State's motion for rehearing, appellant expressly agrees that rehearing should be granted and insists that the Court "reverse its decision and rehear this case in full compliance with Article 40.09 C.C.P. and rule on the pro se brief" on the merits of his appeal.[2/] Indeed, in another response appellant asserts that by not considering the grounds of

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1/ We note that immediately after the verdict of the jury on punishment was received and the trial court pronounced judgment, the court offered to have court-appointed trial counsel handle the appeal or assist appellant in doing so, but was told by appellant:

> "I would, Judge, as I have indicated earlier, I would like to file my own appeal."

The trial court responded, "That will be fine." See, in this regard, Webb v. State, 533 S.W.2d 780, 786 (Tex.Cr.App. 1976).

2/ In that answer appellant informs us that he did not know the amicus curiae intended to argue any grounds of error other than the seventeen raised by him in his pro se brief; in effect, appellant disavows the contentions advanced by amicus curiae that were addressed on original submission.

error in his pro se brief according to Article 37.071,[3] V.A.C.C.P., we are denying him due process of law.

The Court is thus confronted with a demand that rehearing be granted by an appellant whose exercise of selfrepresentation beginning in September 1978 has been seriously questioned. However, those questions and the conclusions reached on original submission are based on a record of proceedings that were held more than two years ago. We judicially know that on or about October 1, 1980, after the opinion in this case on original submission, this Court granted a motion of appellant for leave to proceed pro se in our Cause No. 65,000[4] after a hearing in the trial court, ordered by the Court for that purpose, established conclusively that appellant is well advised as to his right to counsel and the dangers and disadvantages of selfrepresentation, and knowingly and intelligently waived the right and insisted on risking the potential detriment of representing himself.[5] So, applying the rationale of Faretta

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[3] His reference is to §(f) of Article 37.071, supra, which provides for automatic review by this Court of every judgment of conviction and sentence of death.

[4] Also a capital murder case pending on appeal, the parties are the same - albeit a different District Attorney - and to the extent that the matter of selfrepresentation on appeal has been resolved we deem it a related proceeding for purposes of judicial notice. Ex parte Paprskar, 573 S.W.2d 525, 527, n. 1 (Tex.Cr.App. 1978); Ex parte Flores, 537 S.W.2d 458, 460, n. 3 (Tex.Cr.App. 1976); Huffman v. State, 479 S.W.2d 62, 68 (Tex.Cr.App. 1972).

[5] In sum appellant testified that he did not want the lawyers appointed to represent him on appeal to do so; that he did not want any lawyer to represent him on appeal; that he did not want a lawyer to assist him on a stand-by basis; that he wanted the briefs filed by his appointed lawyers to be stricken; that he knew under the Sixth Amendment he had the right to effective assistance of counsel and that he wished to waive that right; that he is a 36 year old, high school graduate; that he has represented himself in an aggravated rape case tried in Harris County and in the instant capital murder case tried in Travis County; that if his time in

Footnote 5 continued -

v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), as was done in Webb v. State, 533 S.W.2d 780, 784 (Tex.Cr.App. 1976), we are satisfied that before this Court appellant has effectively asserted his right to selfrepresentation on appeal in this cause.

What is presented, then, are a State's motion for rehearing asserting that the findings and conclusions of the Court are erroneous and an appellant's motion and answer in propria persona that, in effect, concedes the errors asserted by the State. A confession of error by the State, though uncommon, is ordinarily accepted, e.g., Miller v. State, 460 S.W.2d 427 (Tex.Cr.App. 1970); Arsiaga v. State, 372 S.W.2d 538 (Tex.Cr.App. 1963); Crain v. State, 253 S.W.2d 867 (Tex.Cr.App. 1953); Ramiriz v. State, 153 Tex.Cr.R. 206, 233 S.W.2d 307 (1950); Anderson v. State, 154 Tex. Cr.R. 372, 227 S.W.2d 815 (1950), and there would appear to be no impediment to an appellant's doing the same, if so advised. Certainly, an appellant may deliberately waive possible grounds of error simply by not asserting them in his appellate brief,

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Footnote 5 continued -

court on all three of these cases were added up, the total would be about ten weeks; that during these trials he filed pretrial motions, made objections, etc., at trial, filed motions for new trial, and filed briefs; that he knew the appellate procedure set forth in Article 40.09 (and he recited it accurately); that he has a Code of Criminal Procedure and a Penal Code and has access at all times to law books at T.D.C.; that he has never been declared insane or incompetent by any court and he makes no claim that he is insane or incompetent now; that no one has threatened or persuaded him to represent himself; that he is aware of the dangers and disadvantages of representing himself, but voluntarily chooses to represent himself even if it is to his own detriment; that he knows how to prepare a brief (and he explained how he would point out the errors in the record, cite his authorities and make his arguments); and that he was aware that he might make a mistake which would later harm him if he went into federal court (such as inadvertently waiving some point).

cf. Article 40.09, §9,[6] or by failing to brief one that is assigned, e.g., Williams v. State, 504 S.W.2d 477 (Tex.Cr.App. 1974). It occurs to us that an appellant may still agree with the State that a certain issue is, or is not, in the case, Downes v. State, 22 Tex. App. 393, 3 S.W. 242, 243[7] (Ct.App. 1886), and do so effectively by asserting his agreement in a pro se pleading.

Accordingly, the State's motion for rehearing is granted, and we shall now address such of appellant's seventeen grounds of error as may be required.[8] In a cluster are grounds raising questions about the soundness and reliability of certain psychiatric testimony, but the one that concerns us most is his ground of error number nine. It reads: "Court erred when overruling Appellant's objection to the State witness Dr. Grigson." This broad assertion must be put in perspective.

The offense in the case at bar is alleged to have occurred February 3, 1976. Appellant was arrested the morning of June 30,

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[6] The brief of appellant shall "set forth separately each ground of error of which the defendant desires to complain on appeal. . ." (All emphasis is supplied throughout by the writer of this opinion unless otherwise indicated.)

[7] "This case was submitted to us upon a single question, by an agreement in writing signed by counsel for both parties, and by said agreement all other questions that might arise in the case were expressly waived. * * * We decline to consider and determine this [other] question, in view of the aforesaid agreement of the parties. . ."

[8] While appellant has a right to have the Court consider every ground of error properly raised by him, he is not entitled to a discussion of each question in the written opinion of the Court. Fox v. State, 145 Tex.Cr.R. 71, 165 S.W.2d 733, 734 (1942). Article 44.24, V.A.C.C.P., only requires that the opinion set forth "the reason for such decision" in the case. Lindsey v. State, ___S.W.2d___ (Tex.Cr.App., No. 59,128, delivered October 22, 1980, Motion for Leave to File denied December 23, 1980).

1977, and held without bail.[9] Indictment was returned July 28, 1977.[10] August 8, 1977, on motion of appellant through court-appointed attorney, the trial court ordered Dr. Hugh A. Pennal, an Amarillo psychiatrist, "to determine the mental competency" of appellant to stand trial. Reports from Dr. Pennal to the trial court are dated December 29, 1977,[11] January 31, 1978[12] and February 8, 1978.[13] In June 1978 appellant filed a pro se motion

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[9] In his ground of error sixteen appellant asserts the State did not prove probable cause for his warrantless arrest but, though appellant touched on it in questioning Detective Bill Eaton during a pretrial hearing on motion to suppress his confession, our search of the record does not reveal that the matter was ever made an issue in the case. Indeed, the witness we understand was the senior arresting officer, Lt. Darrell Garner, was not asked a single question about the arrest. Nothing is presented for review.

[10] Appellant complains in his second ground of error that the State did not serve notice that it would seek the death penalty, but he relies on the former provisions of Article 1.14, V.A.C.C.P. that have been legislatively removed. See Batten v. State, 533 S.W.2d 788, 793 (Tex.Cr.App. 1976).

[11] Dr. Pennal recounts the "rather extensive work-up" and states that his conclusion is that appellant "represents, as a diagnostic entity, a classic case of true paranoia."

[12] After completing additional study, Dr. Pennal reports that appellant is competent to stand trial, was not psychotic at the time of the offense and was then sane.

[13] This last report explains the use of the term "paranoia." His first report was meant to connote "extreme suspiciousness," and goes on to note that his additional study reveals that "many sociopathic traits are present."

for hearing on his competency to stand trial, and on October 3 gave written notice that the issue of insanity at the time of the offense may be raised in the case. At a pretrial hearing October 12, 1978 appellant announced his waiver of proceeding on the competency motion but the cautious trial court permitted the prosecutor to develop testimony from Dr. Pennal that in his opinion appellant was completely competent to stand trial. At the conclusion of the hearing the trial court ruled that "there is no evidence to support a finding of incompetency," and followed that oral pronouncement with a written order dated October 17, 1978, denying a jury determination of the matter. Thus, more than a month before the trial began that present competency was not an issue in the case was clearly ruled and understood.[14/]

14/ Later that understanding was underscored when in presenting his insanity defense appellant posed a question to a psychologist who had examined him and the following occurred:

> "Q: Okay, in your opinion, Dr. Wall, am I suffering from a mental disease now?
>
> (District Attorney) It's not a matter at issue, Your Honor. That matter at issue is whether he was suffering from a mental disease or the appropriate issue is whether or not he was legally insane back on February the 3rd, 1976.
>
> THE COURT: I sustain the objection."

As made clear in the opinion on original submission, the matter of appellant representing himself came up several times before a patient trial judge, and finally that right was accorded to him, to be exercised with or without assistance of a court-appointed "standby" attorney as appellant desired. November 27, 1978 the case was called for trial,[15] and after it had been assembled the trial court propounded to the panel of prospective jurors what was characterized as "certain principles of law applicable to this case." Inter alia, the trial court alluded to the fact that appellant was representing himself, outlined the law in that respect, mentioned admonishments given appellant and concluded by instructing the panel:

> "You will not consider the Defendant's having elected to act as his own trial Counsel as any evidence for or against the Defendant or the State in this trial."[16]

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[15] Venue for trial of the case had been transferred from Potter County to Travis County. Before announcing ready for trial appellant made an oral motion for appointment of a Travis County practitioner to assist in jury selection. Ascertaining that appellant was still insisting on representing himself and with appointed "standby" counsel present, the trial court denied the motion. By ground of error five appellant asserts error in this, citing cases that hold appointment of counsel is required at every stage of a criminal proceeding where substantial rights might be affected. However, appellant had waived his right to counsel, and the refusal of the trial court to grant a form of hybrid representation was not error. See Landers v. State, 550 S.W.2d 272, 278 (Tex.Cr.App. 1977); DeRusse v. State, 579 S.W.2d 224, 237 (Tex.Cr.App. 1979).

[16] Immediately preceding the quoted instruction the jury had been told:

> "Defendant representing self. You should know that the Defendant in this case has chosen voluntarily to act as his own Defense Attorney and Mr. Seldon Hale, a practicing attorney in Amarillo, Texas, has been appointed by me to remain standing by during the trial in the event that the Defendant at some point decides to change his election to act as his own Counsel and to exercise his right to be represented by Counsel appointed for him.
>
> It is the law that a person on trial has the right to an appointed lawyer if he is indigent, but it is also the right of the person on trial to act as his own Counsel if he insists on doing so, as the Defendant, Samuel Hawkins, has insisted in this case. His election to do so was voluntarily made after I had admonished him that he would have to observe the same rules of evidence, procedure and law that a licensed attorney acting as a trial counsel would have to observe. And I may necessarily in the course of the trial make legal rulings holding him to these legal standards despite his lack of formal legal training."

Each juror who was ultimately selected was thoroughly qualified by the prosecuting attorney on the matter of appellant representing himself.[17/] Appellant often followed up with one or

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17/ Examination of the juror first accepted, Susan Cavazos, is typical:

"Q: Now, as the Judge told you when you were here as a group earlier this morning, the Defendant in this case is named Sam Hawkins, he is seated to my left. And he has insisted on his right, and he has an absolute Constitutional right, to represent himself as his own Counsel in this trial. And as the Judge told you this morning, he has a right to do that.

A Lawyer has been appointed, that is seated there by him, to standby andgive any advice that is asked for.

Do you have any disagreement with the law that permits a Defendant to represent himself if he insists on it?

A: No, sir.

Q: You think that law is a good law and all right --

A: If he wants to, that's his business.

Q: Okay. Now, during the course of the trial I may make an objection from time to time or I may respond to some objection that the Defendant might make on his own behalf. And you heard the Judge, this morning, tell you that he was going to hold the Defendant to the rules of evidence and courtroom procedure just as though he were a licensed lawyer, and he would have to follow those rules.

Do you have any disagreement with that, do you think that's a fair enough thing if he is going to represent himself?

A: That's fair.

Q: It really, Miss Cavazos, it kind of worries me, because being a licensed myself [sic], I'm afraid that you or anybody else on the jury might think I'm bullying him because -- I mean, I guess he can't help not having a law license, but I can't help having one as we sit here today. Would you hold that against me or against the State that I represent --

A: No, sir, he had an opportunity to get a lawyer and he still can.

Q: And you wouldn't hold it against me, the fact that I do have some legal training, while he does not have any formal legal training?

A: No, sir."

two questions on the point.[18]

Before the State commenced to present its case, then, two ground rules for conduct of the trial were explicit: one, present competency of appellant was not at issue and, two, the fact that appellant was representing himself was not a matter for jury consideration.

The State called its first witness December 4, 1978. He and the others presented by the State during its case in chief testified to certain facts surrounding the offense as well as the subsequent arrest of and statement by appellant concerning it, the final witness being a pathologist who gave his opinion as to the cause of death of the victim.

In presenting his defense, appellant testified[19] and then[20] called Richard Lee Wall, PhD, a Clinical Psychologist, who had interviewed and tested him January 16 and 17, 1978. His initial diagnosis was paranoia, but about three weeks later, after assaying other information, Dr. Wall changed it from paranoia to the less severe "paranoid condition."[21] At the end of Dr. Wall's testimony appellant

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[18] Thus he asked Cavazos whether the fact that he was representing himself affected her in any way; when she asked for amplication, the question and her answer were:

> "Q: Would it make you think I'm committing a stupid act, and agree with the District Attorney that I should be found guilty because of that?
>
> A: No, sir."

[19] Recounting a long history of the consequences of what he termed "an uncontrollable sex drive," appellant recalled earlier efforts at "therapy" in another state. On cross examination at first he made no answer to a question as to whether he had a mental disease but, upon being prodded, he gave a rambling reply that ended with his characterizing that "drive" as a mental defect.

[20] Appellant put an Amarillo television newsman on the stand to have him testify to a series of interviews he had with appellant that were later broadcast, but on objection by the State the trial court ruled out the proposed testimony; we find no error in that ruling.

[21] Dr. Wall told the jury, on cross examination, that he did not know whether appellant was psychotic on February 3, 1976, and that he had "no way of knowing" whether the condition he diagnosed "could reasonably be expected to have changed" between the time of his examination and "the present time."

rested his case.

Dr. Grigson was called by the State as its first rebuttal witness.[22/] Ground of error number nine, though inartfully drawn, is clarified by a paraphrase of portions of the record that are specifically cited, viz:

> "Q: Would you tell the Jury your impression of that document which was delivered to a clinical psychologist named Dr. Wall in connection with his examination of the Defendant?
>
> A: Yes. This is -- if you read it, you find that this is an absolute manipulation on Mr. Hawkins' part, to say, 'See, I must be sick, something is wrong with me.'
>
> Now, what he is doing, as most sociopaths will do, they will make minor concessions such as he doesn't mind telling you about his horrible sexual drive and all of the terrible things which he has done, but what he hopes to gain from this is a major concession.
>
> The con job is, 'You have got to see how crazy I am and how sick I am. You can't consider finding me guilty because of what I am.'
>
> But this is simply manipulation on his part.
>
> MR. HAWKINS: Judge, I object to Dr. Grigson's opinion because he only saw that for a few minutes ago (sic).
>
> And as I shared with the Court earlier, I had a subpoena form to back up everything that is in there, and the State and the Court were the ones that refused the subpoena form which I have here to prove these situations.
>
> So Dr. Grigson doesn't have the authority to say this isn't true.
>
> THE COURT: I will overrule your objection.
>
> You can proceed.
>
> Q: (By Mr. Curtis) Doctor, as you observed the Defendant just at that time, was he displaying some evidence of anxiety as he stood up and made that objection?
>
> A: Well, he, one, is trying to get attention and play like an attorney. This feeds his ego.

22/ In view of appellant's equivocation, note 16, ante, since Dr. Wall disclaimed any opinion about appellant's mental condition at the time of the instant offense, see note 18, ante, there really was not much to rebut.

MR. HAWKINS: Judge, I still object to Dr. Grigson's opinion as to what feeds my ego. He should deal with the examination on this case, Judge, with reference to the evaluation which he took of me, and that's the context of his testimony (sic).

THE COURT: I will overrule your objection."

Dr. Grigson had examined appellant only one time - January 13, 1978, in the Potter County Jail. Our search of the record for his authority to make the examination has produced none, but apparently it was in connection with yet another case pending against appellant in Hutchinson County. We have already observed that during this contemporaneous period appellant was being tested, examined and evaluated by Dr. Pennal through appointment by the trial court.

Dr. Grigson testified that he conducted a mental status examination of appellant, describing to the jury its five parts, and that he came to his now familiar diagnosis of sociopathic personality disorder.[23/] He expressed the opinion that appellant was not suffering from a mental illness or disease either at the time of the examination or anytime prior to it. After elaborating on characteristics he finds in the sociopathic personality, he described appellant as manipulative, then was presented Defendant's Exhibit 1 and gave testimony over objections that appellant cites in support of his ground of error and we have set out ante.

As Dr. Grigson was presenting his views and opinions on direct examination appellant made no objection until Dr. Grigson stated his "impression" of the Defendant's Exhibit 1. When that objection was overruled the District Attorney then pointed out to Dr. Grigson to what appellant, acting as his own attorney, had just done: "Doctor, as you observed the Defendant just at that time. . . as he stood up and made that objection. . ." Thus prompted, Dr. Grigson undertook to inform the jury that appellant "is trying to get attention and play like an attorney" for it "feeds his ego."

23/ See, e.g., Smith v. State, 540 S.W.2d 693, 696 (Tex.Cr. App. 1976), certiorari denied 340 U.S. 922 (1977); habeas corpus relief granted in Smith v. Estelle, 445 F.Supp. 647 (ND Tex. 1977) affirmed 602 F.2d 699 (1979) certiorari granted, cause argued, decision pending; Livingston v. State, 542 S.W.2d 655, 661 (Tex. Cr.App. 1976); Moore v. State, 542 S.W.2d 664, 676 (Tex.Cr.App. 1976); Gholson v. State, 542 S.W.2d 395, 399-401 (Tex.Cr.App. 1976); Chambers v. State, 568 S.W.2d 313, 325-326 (Tex.Cr.App. 1978); see generally, "Witness for the Prosecution," DMagazine, June 1980, 131 ff.

Appellant now asserts, "Yet the court allowed the State's witness to do the very thing he told the jury not t do," and contends admitting the testimony violated his rights under the Sixth Amendment[24/] to the Constitution of the United States, Article I, §10[25/] of the Constitution of the State of Texas and Article 1.05,[26/] V.A.C.C.P.

> ". . . The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.' Illinois v. Allen, 397 U.S. 337, 350-351 (Brennan, J., concurring)."

Thus wrote the Supreme Court in Faretta v. California, 422 U.S. 806, 834, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975). We believe neither the State nor Dr. Grigson honored appellant's personal choice to represent himself. Rather, they denigrated his decision and mocked him for making and carrying it out, and in the doing weakened the carefully structured protection that until that moment had been accorded the constitutional right of appellant to conduct his own defense.

24/ The Sixth Amendment provides the right of an accused to be informed of the accusation against him, to be confronted with witnesses, to have compulsory process to obtain witnesses and to have assistance of counsel "for his defense." From this is derived the correlative independent constitutional right to defend himself. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); Brignon v. State, 399 S.W.2d 810, 812 (Tex.Cr.App. 1966).

25/ In pertinent part §10 of our Bill of Rights provides that an accused "shall have the right of being heard by himself or by counsel, or both." However, the language is not to be taken literally, as Landers v. State, 550 S.W.2d 272, 275 ff. (Tex.Cr. App. 1977), teaches; see also Phillips v. State, 604 S.W.2d 904, 907 (Tex.Cr.App. 1979).

26/ Like §10 of the Bill of Rights, Article 1.05 also speaks of "the right of being heard by himself, or counsel, or both," but see note 25, ante.

It is plain that the preliminary instructions given by the trial court in this respect to the panel of prospective jurors, pursuant to Article 35.17, V.A.C.C.P., were intended and designed to present appellant in that capacity and protect both the accused and the State from any adverse inferences being drawn from the fact that appellant was representing himself. Just as the panel was told they were not to consider his failure to testify should that be his election,[27/] so also they were not to consider his having elected to act as his own trial counsel for or against appellant or the State "in this trial." The questions by the State and the answers by Dr. Grigson thus put before the jury the very matter they had been instructed by the trial court they were not to consider, and had been excluded on objection by the State when appellant broached the subject with Dr. Wall, see note 14 ante.

Years ago in Waters v. State, 91 Tex.Cr.R. 592, 241 S.W. 496, 499 (1922) it was written:

> ". . . The trial of causes involving life and liberty to the citizen, whatever may be his standing or estate, whether he be of high or low degree, the procedure and result involve the most serious matters. Such trials are not to be made mere opportunities for verbal sword-play between competing counsel, nor should the fair judgment of the jury be affected or influenced by aught save the consideration of the testimony and its effect, under the law as presented."

Certainly in this State selfrepresentation is not new, Webb v. State, 533 S.W.2d 780, 783 (Tex.Cr.App. 1976), and from considerations that have caused the Court to deny a right to "hybrid representation," Landers v. State, supra, at 278, Phillips v. State, 604 S.W.2d 904, 907 (Tex.Cr.App. 1979), Webb v. State, supra, at 784, and to require the trial judge to make an accused fully aware that "he will be on his own in a complex area where

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27/ And, of course, it is a well settled constitutional principle by judicial decision and implemented by statutory law that the failure of an accused to testify in his own behalf shall not be taken as a circumstance against him, "nor shall the same be alluded to or commented on by counsel in the cause," Article 38.08, V.A.C.C.P. See Stafford v. State, 67 S.W.2d 287 (Tex.Cr.App. 1934).

experience and professional training are greatly desired," Trevino v. State, 555 S.W.2d 750, 751 (Tex.Cr.App. 1977), and that "he will not be granted any special consideration because of his lack of formal training in law," Geeslin v. State, 600 S.W.2d 309, 314 (Tex.Cr.App. 1980), it follows that though not an attorney an accused is expected to conduct himself like one to the extent of his ability to do so.

In Williams v. State, 549 S.W.2d 183, 189 (Tex.Cr.App. 1977), following Faretta v. California, supra, at n. 46,[28/] the Court stated, "When an accused elects to represent himself he cannot complain that the quality of his own defense amounted to a denial of effective assistance of counsel." Also, the Court has observed that a selfdefending accused "has no right to ask for a reversal because he alienated the jury while doing so," Rasberry v. State, 535 S.W.2d 871, 873 (Tex.Cr.App. 1976). However, neither the Supreme Court nor this Court has ever indicated that an accused who is exercising his independent constitutional right to represent himself is fair game for the State and its witnesses. Indeed, if the right is to have any practical meaning, its actual exercise must be honored "out of 'that respect for the individual which is the lifeblood of the law'" as much as the initial decision. Making sport of appellant for voicing the very first objection to testimony of Dr. Grigson is the antithesis of deference to the determination by an accused to represent himself demanded by the Supreme Court of the United States in Faretta. Such an accused is entitled to give his best effort to be effective counsel for himself without demeaning characterizations or innuendos that would or should not be permitted against a licensed trial counsel. Cook v. State, 537 S.W.2d 258, 261 (Tex.Cr.App. 1976) and cases cited

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28/ "The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules or procedural and substantive law. Thus, whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel'."

therein; see Ford v. State, 314 S.W.2d 101, 102 (Tex.Cr.App. 1958): "Lawsuits should be tried upon the issues raised and submitted to the jury and not upon collateral issues such as personal conflicts between counsel."[29/] As the Court remarked in Franklin v. State, 41 Tex.Cr.R. 21, 51 S.W. 951 (1899):

> ". . . We would observe here that counsel has a right at all times during the progress of the case, in proper manner, to reserve a bill of exceptions to any action of the court or counsel deemed improper, and he has a right at all times in taking his bill of exceptions to be treated in a respectful manner. No doubt the purpose of the district attorney was to belittle his exception. This course of practice should not be allowed." 30/

Accordingly, we hold that where competency to stand trial is not an issue and the accused is exercising his independent constitutional right to conduct his own defense it is error of constitutional dimension for the prosecutor or a witness to comment adversely concerning the mental attitude of the accused as he is exercising that right.

Nevertheless, though the exchange between the prosecutor and Dr. Grigson and the adverse ruling by the trial court were erroneous and occurred in a capital case, the question remains whether the errors are harmless beyond a reasonable doubt. Schneble v. Florida,

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29/ This observation came in the context of finding reversible error in overruling objections to improper questions propounded by the prosecutor to defense counsel, whom he had called as a witness, "which were calculated to leave the impression with the jury that appellant's counsel had been guilty of some trick or device in the selection of the jury."

30/ In Waters v. State, 91 Tex.Cr.R. 592, 241 S.W. 496, 499 (1922) the Court similarly urged that "there is no need for the attorneys for the people to resort to such methods" as the making of sidebar remarks and "to belittle the objections and complaints made on behalf of appellant."

405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972);[31] Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 340 (1969);[32] Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).[33] That determination is for this Court in the first instance, Foster v. California, 394 U.S. 440, 444, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969), and we now turn to make it.

The bare bones of the case presented by the State are described in the opinion on original submission. Appellant "in essence admitted the commission of the offense" of killing a twelve year old girl during the course of kidnapping her from her home and thereafter attempting to, if not actually accomplishing, rape. As well as a confession produced by the State there was an abundance of circumstantial evidence that appellant did just what

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[31] A violation of Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d (1968), was found harmless by the Supreme Court.

[32] Overwhelming evidence of guilt may relegate constitutional error to condition of harmlessness. The error we now treat occurred, it is to be remembered, on rebuttal during the guilt-innocence phase of the trial.

[33] In a "reasonably strong 'circumstantial web of evidence' against petitioners" in which "honest, fair-minded jurors might well have brought in not-guilty verdicts," a "machine-gun repetition of a denial of constitutional rights (prosecutorial comments on failure to testify), designed and calculated to make petitioner's version of the evidence worthless" cannot be considered harmless, 386 U.S. at 25-26.

he said in his confession he did.[34/]

Also before Dr. Grigson gave his testimony, appellant, thoroughly cautioned and warned by the trial court that on material matters he was waiving his constitutional right against self-incrimination by taking the stand, did so and testified in narrative form at some length - spurning the option of having his "standby attorney" pose pertinent questions to him. Beginning with his early childhood, appellant related that his "sex drive" was strong, such that he masterbated so regularly that there were times when his penis became "raw or swollen twice its size." We allude to this earthy testimony of appellant since he regards such manifestation of his early "sex drive" as indicating the "mental defect" that continued to preclude selfcontrol of his sexual behavior toward others generally and certain victims particularly. The details of that continuing course of misbehavior we will pretermit; suffice to say that he narrated a history of juvenile indecency with his minor sisters and attempted buggery, followed by incidents as an adult of public lewdness, a rape in

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[34/] ". . . I just wanted to get her away from the house so she would'nt [sic] scream. She couldn't have seen the truck that I was in because I put a stocking over her eyes that I had taken out of the front room of the house. * * * I took her to my truck, and she got in. We then drove off. I got about three miles or so down the road and the girl started screaming and kicking. I tried to calm her down and when I couldn't I got excited. I noticed a piece of steel in the floor board of the truck. This piece of metal was about a 12 inch square. I picked the piece of steel up and hit the girl in the left side of the face. The girl fell over. When the girl fell over, I hit her again. I don't remember how many times I hit her but I kept hitting her with the piece of steel. The girls [sic] head was bleeding very much, so I got the pillow case off of a pillow that I had in the truck, and I wrapped it over the girls [sic] head to keep the blood from getting on the seat. * * * I came to a little gutter bridge in the road. I stopped the truck, and drug her out, and put her under the bridge. I then left her under the bridge and went back to my job. I knew that the girl was dead when I hit her the first time because she fell over and didn't move. . . ."

Denver, Colorado, an entry with intent to rape in Oklahoma City, Oklahoma, and "the same problems" for a year in Jacksonville, Florida - all prior to moving to the Amarillo area. There, appellant was, as he summed it up, "arrested on some 13 rapes. . . and two murders as a result of this sex drive which didn't ever change." Appellant concluded his personal presentation by summarizing his conversations with several Amarillo police officers and detectives, in which he "shared with them my problem," subsequently confessed to committing the instant offense and others, and bringing himself "to the point pretty much where I am now with this problem." On cross-examination appellant acknowledged that he had been convicted of the more particularized offenses he had recounted, and evasively conceded to killing the victim in the case at bar.

Appellant then called Dr. Wall and through him developed much of the same history, winding up the examination with introduction of a seven page handwritten account of the same history signed by appellant. It is Defendant's Exhibit 1, which when shown to Dr. Grigson for his "impression," gave rise to the disputed exchange.

Thus, the jury had before it appellant's own live testimony of his "problems," the history given Dr. Wall and a personally written report that appellant himself had prepared (for consideration by Dr. Wall in his examination) and on his own initiative introduced as an exhibit in presenting his defense. Not only is evidence of his guilt of the offense charged overwhelming, but also we must conclude "that the 'minds of an average jury' would not have found the State's case significantly less persuasive" had the testimony of Dr. Grigson as to appellant's "ego trip" in representing himself been excluded, Schneble v. Florida, supra, 405 U.S. at 432.

Therefore, the ninth ground of error presents error that is harmless.

Ground of error one contends that his written confession was not voluntarily made by appellant, in that it is the product of unkept promises by his interrogators. The court conducted a far-ranging hearing on a pro se motion to suppress the confession, alleging inter alia that promises to obtain "mental help" for him caused appellant to begin to discuss his "problems" and several offenses he had committed and persuaded him to sign the written confession.

We note at the outset that the statement recounting the instant offense was but one of a trio of confessions to separate crimes purportedly made by appellant during the morning of July 1, 1977, the day following his arrest. This statement, as well as the other two, reads just above his signature, "I am giving this statement to Det. LaFavers of the Amarillo Police Dept. without any threats or promises given to me by him or anyone else of that Dept. I have read the above statement and it is true and correct to the best of my knowledge." Detective LaFavers testified that, in the presence of and with the assistance of two other officers, he interviewed appellant for some three hours before the first statement, the one in this case, was typed by him and read and signed by appellant; during that period of time, according to LaFavers, appellant appeared to be acting voluntarily, no threats or promises were made and there was no force of any sort used against him during the interview. The interview, or at least portions of it, were recorded and in our record are three substantially similar but still strikingly different transcriptions of the

recording.[35] Before being confronted with any of them, LaFavers dissembled with respect to whether he had made certain statements that appellant translated into "promises,"[36] but he did generalize his own thoughts concerning them, viz:

> "My intention was not to promise you anything at that time, I don't feel as if it came across that way, . . . I didn't at the time feel and I don't now feel that you interpreted it that way."

The trial court heard the testimony, indicated that the transcriptions had been read, reviewed and compared and apparently agreed with LaFavers, for it pronounced the finding that "beyond a reasonable doubt the confessions which were introduced were voluntarily made." Subsequently, the oral ruling was reduced to written particularized findings and conclusions, two of which are:

> "The defendant. . . was not coerced into making any of the said statements by any force, threats, persuasion, or promises or any other improper influence.
>
> The statements given were reduced to writing; the defendant read them completely and signed them of his free will."

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[35] Two begin identically with appellant saying, "I was probably about 9 or 10 years old," whereas the one proffered by appellant has him adverting to earlier remarks: "I was talking about, a minute or two minutes ago, my daddy. . ." The recording machine was being operated by Captain of Detectives E. N. Smith who, though testifying to related matters, recounted little of what preceded the opening remarks of appellant. Elsewhere it appears that appellant had been questioned unsuccessfully by other officers throughout the afternoon and evening of the day of his arrest. At about 11:00 p.m. Deputy Sheriff Isaiah Garrett, a black like appellant, visited with him alone. Being cross-examined by appellant, Garrett denied telling appellant that he had a sickness and "we're going to put you in the hospital." Rather, Garrett testified, he told appellant, "You have a problem," without characterizing it, and "You need to tell the truth and get this over with." (When Captain Smith testified before the jury, he answered affirmatively when asked by appellant, "Do you remember that the suggestion to give the confession was to Sergeant Garrett?") Presumably Garrett then summoned the other officers, the recording device was then turned on and appellant began a monologue covering two pages of the transcription before being interrupted by LaFavers.

[36] Drawing from a transcription of the recorded interview in his possession, appellant cross-examined LaFavers about making such statements as "It [appellant's sex drive] is something that you yourself can't hold yourself at fault for, it is something that we will help you with, we will do that," "[W]e recognize the fact that you need help, and you are seeking that help now, psychological and psychiatric help, and I think the Courts will recognize that fact" and "You have the opportunity to help a lot of other people. So I think you are making the right choice, you're relieving yourself and you're relieving a lot of people. . ." These statements do appear to have been made, but the questions posed them completely out of context.

However much appellant disputed the testimonial and documentary evidence that support those findings,[37/] the trial court "is the sole judge of the weight and credibility of the witnesses," Harville v. State, 591 S.W.2d 864, 867 (Tex.Cr.App. 1979), and, believing or disbelieving all or any part of the testimony of any witness, Hughes v. State, 562 S.W.2d 857, 863 (Tex.Cr.App. 1978), resultant findings of the trial judge will be upheld if supported by the evidence, Myre v. State, 545 S.W.2d 820, 824 (Tex.Cr.App. 1977).

37/ Appellant's attitude, reflected by his own testimony, is that he was "dealing with people that were tricking me, that were lying to me, that were deceiving me, promising me help when their sole intention was to file capital murder on me and give me the death penalty," while he was "trying. . . to get the help I need." As we read the transcriptions, they simply do not support that position. Before his monologue was interrupted by LaFavers, according to the defense version of the recording, appellant had already moved from his childhood problems through his inability to satisfy his wife to admitting the rape in Denver and an attempted rape, concluding, "Sometimes I would leave home with good intentions, but some force would turn me around. For the last two weeks or so. . . I didn't want to live that way any longer and I still don't." Then LaFavers made sympathetic remarks, including the willingness to try to help with the problem, and was expressing an understanding of appellant's "situation" when appellant interjected his own thought that there are "two personalities in me." Building on that LaFavers opined that the better personality could overcome "this other mind that keeps dominating" the body, and that just recognizing and admitting the need for help is "half the battle," so that the "crisis that you are going to have to eventually go through" is "happening now" and appellant ought to think about helping other people and himself; with that LaFavers said, "There's no sense in fighting us or us fighting you or batting our heads any more," and suggested that "we go back to this period when it started here. . . and you go ahead and fill me in." Responding, "Okay," appellant began to answer some general questions and shortly more specific ones about past crimes, phrased by LaFavers from a "book of reports" to "refresh" appellant's memory. At last LaFavers requested appellant "to go back to the girl in Panhandle," the case at bar, and in answer to questions appellant related in detail how he committed the offense. In much the same way appellant described another homicide in Borger. He was then offered a soft drink and a piece of pie and, while waiting for them to be brought, according to the transcription, LaFavers spelled out appellant's name as he began to type in the confession form.

There is ample evidence to support the findings of the trial court.[38/] We adhere to the settled rule that a confession must be free and voluntary and is not to be "obtained by any direct or implied promises however slight, nor by the exertion of any improper influence," Roberts v. State, 545 S.W.2d 157, 161 (Tex.Cr. App. 1977). Still, even if, contrary to the usual procedure on review, the various statements made by LaFavers are viewed in a light most favorable to appellant, they do not constitute promises to obtain "mental help" in exchange for a confession. So far as this record shows, it was appellant who first introduced to his interrogators a long history of abnormal sexual behavior to account for his most recent persistently bizarre misbehavior and violent criminal acts and conduct. Naturally LaFavers and the other officers professed understanding and empathy when appellant expressed so much self-concern that he "didn't want to live that way any longer and I still don't" - not to promise anything but to get to the point of the interrogation.[39/] In the circumstances of this case, we find that kind of role-playing was neither improper nor did it induce or persuade appellant to confess his guilt.

38/ We note that in trial LaFavers acknowledged making nearly every statement attributed to him by the transcription, taking pains at times to explain his true intent and purpose was other than promising anything, and a properly charged jury found the confession by appellant was "freely and voluntarily made. . . without compulsion or persuasion." That finding is also supported by the evidence. Ground of error seventeen, contending otherwise, is overruled.

39/ As LaFavers explained to appellant before the jury, "I didn't want to, so to speak, lose you at that point, and you to talk about different things, so I would agree with you on points rather than try to agitate you by disagreeing."

See Roberts v. State, supra, at 161. Thus, we further conclude that the evidence supports the two findings of the trial court, excerpted ante, and overrule ground of error one. Harville v. State, 591 S.W.2d 864, 867 (Tex.Cr.App. 1979); Burks v. State, 583 S.W.2d 389, 393 (Tex.Cr.App. 1979); Hammett v. State, 578 S.W.2d 699, 711-712 (Tex.Cr.App. 1979); Hughes v. State, 562 S.W.2d 857, 863 (Tex.Cr.App. 1978).

Grounds of error eleven and twelve assert, respectively, that the trial court allowed the State to suppress evidence favorable to appellant and that assessment of the death penalty is contrary to law. However, his real complaints concern remarks by the prosecutor that appellant says presented "a false picture" to the jury[40/] and the recanting of their initial impressions of his mental condition by Dr. Wall, the psychologist, and Dr. Pennal, the psychiatrist, as well as the limited examination conducted by Dr. Grigson to base his testimony. "This kind of madness by the court and prosecutor, with extreme attempts to suppress evidence,[41/] and paint a false picture to the jury," he argues,

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40/ One part of the "false picture" was introduction of personal items - a pillowcase, towel, and the like - taken from the home of appellant by officers armed with his written consent to search. His objection to their being admitted, also claimed as error in ground ten, is that the officer did not receipt for the items. The contention is utterly without merit. The authority he cites, old Article 18.20, V.A.C.C.P., no longer exists.

41/ This is probably an allusion to the fact that certain subpoenas obtained by appellant were not served, or at least a return of service was not made. The complaint is made in more detail in ground of error three. However, the trial court, upon learning that the applications for subpoenas were not made until during voir dire, warned appellant that they might be too late, offered to do all possible to see they were served, later directed standby counsel to assist in expediting appearances and generally extended utmost cooperation. The simple fact of the matter is, as the trial court expressly found in the record, that appellant did not exercise due diligence in this respect, see, e.g., Denny v. State, 558 S.W.2d 467, 470 (Tex.Cr.App. 1977), nor have the record reflect that the prospective testimony would be material to his defense. This ground of error is overruled as, for much the same reasons, is ground of error four complaining of refusing a continuance on account of the missing witnesses and records. See Jones v. State, 501 S.W.2d 677, 679 (Tex.Cr.App. 1973).

"resulted in an illegal sentence [sic] of death to the appellant."

Every record reference cited by appellant has been carefully read and considered against his complaints and argument, and it is our judgment that there is no error in any of this. The jury was made aware of the changed diagnoses and the reasons therefor; it was the exclusive judge of the credibility of the witnesses and the weight to be given their testimony. As judges of a reviewing court we cannot say the jury was misled in performing its exclusive function, to the detriment of appellant. Grounds of error eleven and twelve are overruled.

In another cluster of grounds of error, thirteen, fourteen and fifteen, appellant contends the State did not prove "knowingly" and "intentionally," as alleged in the indictment, and "deliberately," as submitted in special issue one pursuant to Article 37.071(b)(1), V.A.C.C.P. But the thrust of his similar contention in each ground of error is not to an evidentiary insufficiency of his culpable mental states and his deliberateness. Rather, citing V.T.C.A. Penal Code, §§8.01[42/] and 19.06,[43/] and asserting that the State's testimony about his state of mind was "in violation" of Article 46.02,[44/] V.A.C.C.P.,

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42/ Section 8.01 provides that insanity at the time of the offense is an affirmative defense, and it defines "mental disease or defect."

43/ Section 19.06 dictates that in prosecutions for murder or voluntary manslaughter admissible evidence includes "all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense."

44/ Article 46.02, supra, prescribes procedures for determining and consequences of finding incompetency to stand trial - a question that was answered in the case at bar by unimpeachable pretrial proceedings; see discussion under ground of error nine, ante.

appellant would have it that the matter of his sanity at the time of the offense "is still unresolved." With this we do not agree, for with a full exposition of available testimony and documentary evidence before it and properly charged on the issue by the trial court, the jury had to find in order to convict appellant, and patently did find, that his affirmative defense of insanity was not supported by a preponderance of the evidence, a burden that the law imposes on appellant. Graham v. State, 566 S.W.2d 941, 943, 948-953 (Tex.Cr.App. 1978) is particularly instructive in these respects, and from the record of what the jury heard and saw we are unable to hold this to be one of those rare cases in which the findings by the jury on the sanity issue must be overturned, Graham v. State, supra, at 953. Grounds of error thirteen, fourteen and fifteen are overruled.

Citing to us Bounds v. Smith, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d (1977), appellant complains in his sixth ground of error that the trial court erred in denying him access to a law library. In the context of a convicted inmate of a state correctional institution, the Supreme Court held that a prisoner's right to access to courts requires provision of an adequate law library or adequate assistance of persons trained in the law. Through a layman confined with him in the Potter County Jail, appellant addressed to the trial judge a written request for access to a law library that is dated September 28, 1978 and bears a timestamp of October 3, 1978. The request was rejected by written order reciting that it was considered on the latter date and denied because the assisting layman "has no standing" in the cause involving appellant.[45/] Be that as it may, during this period of time appellant

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45/ But see Johnson v. Avery, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969), holding invalid a statute prohibiting aid from a fellow inmate in the absence of an adequate substitute.

was represented by court-appointed counsel who prepared and filed motions in his behalf, participated in pretrial hearings to the extent appellant, then pondering selfrepresentation, would permit and generally rendered aid and assistance ordinarily expected of a criminal law practitioner. Not until a full pretrial hearing held October 6, 1978, did the trial court determine and order that appellant had waived his right to court-appointed counsel and, concomitantly, would be permitted to defend himself - with such assistance of standby counsel as he desired. Thus, even if the rationale of Bounds v. Smith, supra, be applicable to a pretrial detainee in a local jail - and we need not decide that point - still the ruling of the trial court was correct for appellant then had adequate assistance of an attorney trained in the law.

Subsequently appellant was transferred from Potter County to the Travis County Jail; an order directing the Sheriff to do so is dated October 17, 1978, and a paper purportedly executed by appellant in Travis County shows his date of commitment in that jail as October 18, 1978. November 27, 1978, with scheduled voir dire about to commence, appellant moved orally for access to a law library, to which the trial judge responded, "I will have Mr. Hale [standby court-appointed counsel] obtain and we will assist you in obtaining anything that you specifically request. . . [and] . . . if you don't know exactly what you need but you want him to find what is available on a certain point of law then I will request him to do that research for you and to bring you, either through Xerox copies or through actual books, the items you request."

Appellant did not protest that procedure and now does not contend the program planned by the trial judge was not implemented.

Indeed, in arguing under this point he states, "Travis County does have a prison inmate library in the County jail. . . [and] it is a full volume library," and that he was aided by the librarian, whose name is given. We perceive no error in the initial ruling by the trial court in Potter County nor the manner of providing access to legal materials in Travis County. Ground of error six is overruled.

In his seventh ground of error appellant complains that the trial court overruled his objection to what he sees as an attempt by the prosecutor to prejudice verniremembers by the phraseology of an introductory remark to the law concerning an affirmative defense of insanity. He claims a reoccurrence over his objection "several times," but only directs us to a single incident, examination of the eleventh venire person, Betty Cowie, viz:

> "[Prosecutor]: The Defendant has exercised another right that any defendant in any criminal case has; he has given notice that intends to claim the defense of insanity as a defense in an effort to be found not guilty of the indictment against him.
>
> MR. HAWKINS: Judge, I object to that, his quotation that I claim to use the insanity in order to not be found guilty of an offense.
>
> THE COURT: I will overrule the objection." 46/

46/ During his own examination of Cowie, appellant and she got into an exchange over whether, as appellant would have it, "a violation of the law is not a crime when a person commits it while he is insane;" her thought was that "it is a violation whether you're insane or not." The ensuing verbal flap was calmed when the trial judge pronounced the difficulty "just a problem in semantics." The Court has stated the view expressed by Cowie in strikingly similar terms:

> ". . . Insanity is a defense that excuses a defendant from punishment because of his state of mind at the time of the commission of the act. . . . It does not mean that the conduct. . . does not constitute an offense."

Pesch v. State, 524 S.W.2d 299, 301 (Tex.Cr.App. 1975). As more recently pointed out in Graham v. State, supra, at 948, "The purpose of the insanity defense issue is to determine whether the accused should be held responsible for the crime, or whether his mental condition will excuse holding him responsible." We have dwelled on this matter in order to demonstrate the basic misconception that colors appellant's approach to and his analysis of the asserted ground of error.

Not being pointed to pages in the record where, according to appellant, the State similarly addressed five persons who ultimately were seated as jurors, or even their names, for resolution of the problem we will not assume arguendo that such is the state of the record.[47/] As to them, nothing is presented for review. Love v. State, 533 S.W.2d 6, 9-10 (Tex.Cr.App. 1975); Chappell v. State, 519 S.W.2d 453, 457 (Tex.Cr.App. 1975); Dabbs v. State, 507 S.W.2d 567, 569 (Tex.Cr.App. 1974); Reynolds v. State, 506 S.W.2d 864, 866, 867 (Tex.Cr.App. 1974). We may not take venireperson Cowie as a typical example, see Davis v. State, 529 S.W.2d 547, 548 (Tex. Cr.App. 1975), for before being excused for cause she made it plain that even should appellant prove his insanity as defined by law she would still convict him. Thus, as to her at least, appellant was helped, not harmed, by the insinuating phrasing of its question by the State. Ground of error seven is overruled.

The grounds of error presented by appellant do not reveal any error harmful enough to require reversal of his conviction.

The State's motion for rehearing is granted and the judgment is affirmed.

CLINTON, Judge

EN BANC

(Delivered January 14, 1981)
McCormick, J., not participating

47/ The voir dire examination was of thirty three prospective jurors; it consumes one thousand pages in five separate volumes of the record before us. That appellant is able accurately to cite volume, page and line numbers of the record in reference to the Cowie exchange and other transactions about which he complains under the balance of his ground of errors evidences his access to the whole record. Even the mandatory review of conviction in a capital case does not excuse a failure to comply with important rules for briefing grounds of error in this Court, e.g., Article 40.04, §9, that are applicable to an appellant acting pro se as well as one represented by counsel. Williams v. State, 549 S.W.2d 183, 186-187 (Tex.Cr.App. 1977).

No. 62,534

SAMUEL HAWKINS,
Appellant,

vs.

THE STATE OF TEXAS, Appellee

APPEAL FROM

TRAVIS County

P.D.R.

STATE'S MOTION FOR REHEARING GRANTED - JUDGMENT OF CONVICTION AFFIRMED

OPINION BY

SAM HOUSTON CLINTON,
Judge

EN BANC

McCormick, J., not participating

FILED IN
COURT OF CRIMINAL APPEALS
JAN 14 1981
Thomas Lowe, Clerk

SAMUEL HAWKINS, Appellant

NO. 62,534 v. - - - Appeal from TRAVIS County

THE STATE OF TEXAS, Appellee

O P I N I O N

This is an appeal from a conviction for capital murder. The jury answered affirmatively the special issues submitted pursuant to Article 37.071, Vernon's Ann.C.C.P. Accordingly, the punishment was assessed at death.

Appellant was tried in Travis County on a change of venue from Potter County. This case presents a rather novel factual situation. This capital murder defendant, who had had past dealings with the criminal justice system, chose to represent himself at his capital murder trial. Standby counsel was appointed to assist appellant in the conduct of the trial. Counsel sat with appellant throughout each phase of the trial and consulted with appellant from time to time. However, the record reflects that appellant himself conducted the voir dire examination of the jury, examined and cross-examined witnesses, made objections to evidence offered by the State, testified in his own behalf, submitted proposed jury charges, and argued his case to the jury.

The State's evidence showed that appellant murdered a 12 year old girl during the course of kidnapping and attempting to rape her. Appellant's defense was insanity. He, in essence, admitted the commission of the offense, which was substantiated by a confession which he had made earlier, but claimed that he was unable to conform his conduct to the requirements of the law. See V.T.C.A. Penal Code, Section 8.01.

Appellant also represents himself on appeal. However in a brief filed by amicus curiae,[1/] the contention is advanced that

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1/ The amicus curiae, granted leave to file a brief in appellant's behalf, represent the Texas Civil Liberties Union.

the trial court erred in permitting appellant to represent himself without 1) determining that appellant made an intelligent and voluntary waiver of counsel and, 2) admonishing appellant sufficiently as to the dangers and disadvantages of self-representation. Under the authority provided by this Court, we are constrained to agree.

The record reflects that the trial court appointed four different lawyers to represent appellant at different times, with appellant refusing the services of each. Appellant, who the record indicates had recently been on trial for other crimes, thought that none of the attorneys appointed by the court would work in his best interest. Over the course of several weeks, prior to trial, the trial court and appellant had continuing conversations concerning the issue of legal representation of appellant. Relevant portions of those discussions are as follows:

> "THE COURT: ... If you want to represent yourself, and understand, Mr. Hawkins, I do not think that that is in your best interest, I think that you are not qualified, your education does not qualify you to represent yourself. But if you are going to insist on representing yourself, and I know you have been over this in prior trials with prior Judges and you understand that right, I will allow you to do so.... we might as well cover this, even though you are not a lawyer, I'm going to expect you to conduct yourself in the same way that a lawyer would. And you will be required to ask questions in the same manner that a lawyer would and I will not tolerate any kind of disruptive behavior.
>
> * * *
>
> [Appellant] ... I'm not silly enough to think that I'm competent to represent myself, I don't think that for a second, I never thought that. But I know, as far as [the appointed attorneys] representing me, the competency is equal.

The trial court inquired of appellant whether he would accept representation by counsel if the court appointed still another lawyer. Appellant indicated that he would, and the trial court

did so. However, at the next hearing, after new counsel had been appointed, the discussions continued.

> "THE COURT: ... When we proceed, either you are going to represent yourself or Mr. Hale is going to represent you. And if you are going to persist in standing up and making your own objections and making your own statements, then you will have made the decision to represent yourself.
>
> THE DEFENDANT: Judge, I'm not going to take just a flat passive role in this case when its for my life, if that's what you expect me to do, I'm not going to do it.
>
> * * *
>
> THE COURT: ... if you want to represent yourself you can. But you are not going to have your cake and eat it too. You are either going to have Mr. Hale represent you or you are going to represent yourself. And I am not going to hear two sets of motions and two sets of objections on every point that comes up."

Later, the trial court convened a special hearing to finally resolve the question of whether appellant would represent himself. The record reflects that appellant told the court that he had decided to represent himself. The trial court rejected his request that he be allowed to be represented by an attorney and act as co-counsel, participating in the trial. Although the court would not accept this hybrid representation, it did indicate to appellant that standby counsel would be available to advise appellant or to take over representation, should appellant change his mind during the course of the trial. The court admonished him:

> "... either you have got to take on the representation or you have got to give Mr.Hale the authority to take on the representation and consent to that and be bound by his decisions.
>
> Also, I want you to understand, and I think you do if you did read those cases,[2/] that

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[2/] The record reflects that the trial court gave appellant some cases on this subject to read; the record, however, does not reveal what cases these were.

> should you decide to represent yourself that you will be bound by the law and so you will be bound by the procedural rules that we have in court, and you will be bound by the, what we call 'substantive law,' you will be bound by the law that exists in the United States and in the State of Texas regarding the criminal offense and criminal trials."

After this, the court entered an order permitting appellant to represent himself.

The Sixth Amendment to the Constitution of the United States and Article 1, Section 10 of the Texas Constitution provide that a defendant in a criminal trial has the right to the assistance of counsel. This right to counsel may be waived and the defendant may choose to represent himself at trial. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 561 (1975). However, as the Supreme Court stated in Faretta:

> "When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must 'knowingly and intelligently' forego those relinquished benefits. Johnson v. Zerbst, 304 U.S. at 464-465, 58 S.Ct. at 1023 [citation omitted]. Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' Adams v. United States ex rel. McCann, 317 U.S., at 279, 63 S.Ct., at 242."

A waiver of the right to counsel will not be "lightly inferred" and the courts will indulge every reasonable presumption against the validity of such a waiver. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Geeslin v. State, ___ S.W.2d ___, (No. 58,451, delivered May 7, 1980); Trevino v. State, 555 S.W.2d 750 (Tex.Cr.App. 1977). The prosecution has a heavy burden to demonstrate that a waiver of constitutional rights was made intelligently, knowingly and voluntarily, particularly when that right was the right to

counsel. Geeslin v. State, supra; Trevino v. State, supra; Robles v. State, 577 S.W.2d 699 (Tex.Cr.App. 1979); Barbour v. State, 551 S.W.2d 371 (Tex.Cr.App. 1977).

In determining whether a valid waiver of counsel has been made, Faretta, supra, requires, and this Court has repeatedly stressed that: (1) the defendant must make a knowing and intelligent waiver and (2) the defendant must be made aware of "the dangers and disadvantages of self-representation. Faretta v. California, 422 U.S. at 836, 95 S.Ct. at 2541; Goodman v. State, 591 S.W.2d 498 (Tex.Cr.App. 1980); Renfro v. State, 586 S.W.2d 496 (Tex.Cr.App. 1979). These are two distinct requirements and the trial court must be satisfied as to their existence before allowing a defendant to represent himself.

This Court has previously held that in order to determine whether a defendant's waiver is intelligent and voluntary, the trial court should inquire into the defendant's background, age, education and experience.[3/] Geeslin v. State, supra; Renfro v. State, supra; Lisney v. State, 574 S.W.2d 144 (Tex. Cr.App. 1978). The record should reflect such an inquiry and it should further show that the defendant was informed as to his right to counsel and that he affirmatively waived this right, intending to represent himself alone. Webb v. State, 533 S.W.2d 780 (Tex.Cr.App. 1976); Thomas v. State, 550 S.W.2d 64 (Tex.Cr.App. 1977). The trial court is not obligated to assess a defendant's technical legal knowledge and such knowledge is

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[3/] We note that these factors have been treated in some cases to be mandatory inquiries. See, e.g., Geeslin v. State, ___ S.W.2d ___ (No. 58,451, delivered May 7, 1980); Renfro v. State, 586 S.W.2d 496 (Tex.Cr.App. 1979). They are not mandatory inquiries, in and of themselves. Rather, they are only some factors, which, among others, may be proper inquiry for the trial court in determining whether a defendant is knowingly and intelligently waiving his right to counsel.

not relevant to an assessment of his knowing exercise of the right to defend himself. Faretta v. California, supra. Rather, the defendant must show sufficient intelligence to demonstrate a capacity to waive his right to counsel and the ability to appreciate the practical disadvantage he will confront in representing himself. Trevino v. State, supra.

Pursuant to the mandate of Faretta, the trial court is also obligated to insure that the defendant waiving his right to counsel is fully aware of the dangers and disadvantages of self-representation. In Webb v. State, supra, this Court stated, "The trial court should... admonish an accused who desires to represent himself regarding the wisdom and the practical consequences of that desire." The facts demonstrating the defendant's awareness of such must affirmatively appear in the record. Webb v. State, supra. The defendant should be made aware of the general nature of the offense he is charged with and with the possible penalties that may be imposed. Geeslin v. State, supra; Goodman v. State, supra. The defendant should be made aware that there are technical rules of evidence and procedure that he will be obligated to comply with and that he will not be granted any special consideration because of his lack of formal training in law. In short, the defendant must be aware that "he will be on his own in a complex area." Geeslin v. State, supra; Trevino v. State, supra.

In the instant case, we must conclude that the trial court's admonitions to appellant were not sufficient to meet either the standard for waiver of counsel or the standard enunciated in Faretta. See Geeslin v. State, supra; Goodman v. State, supra; Barbour v. State, supra. Since the record does not affirmatively reflect appellant's intelligent, voluntary and knowing waiver of representation by counsel, and that he was aware of the dangers and disadvantages of self-representation, the case must be remanded for a new trial.

We are not unmindful that an accused's right to represent himself cannot be manipulated by him so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice. Robles v. State, 577 S.W.2d 699 (Tex.Cr.App. 1979); Webb v. State, supra. Indeed, the trial court here was confronted with a very difficult defendant, who rejected lawyer after lawyer appointed to represent him. However, it is nevertheless the duty of the trial court to insure that a defendant, even an uncooperative one, understands well what he stands to lose by the rejection of counsel and the decision to proceed in his own behalf.

It has been suggested that a capital murder defendant, who is facing the possibility of a death sentence, can never validly waive counsel and represent himself. This is not true. Faretta v. California, supra, held that the right of self-representation is embodied in the Sixth Amendment to the Constitution. Indeed, the rationale of Faretta was based upon a recognition that,

> "The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.' [citation omitted]" [Emphasis added] Faretta v. California, 422 U.S. at 835, 95 S.Ct. at 2540, 2541.

Since Faretta was premised upon the recognition of respect for individual choice, the defendant himself bearing the personal consequences of a criminal conviction, what greater interest can the State have in protecting this choice than in a situation where the defendant faces the ultimate punishment.

The suggestion is also made that a defendant, who chooses to advance a defense of insanity, can never be competent to waive counsel and represent himself. Neither is this true.

A defendant, competent to stand trial, who is able to make a knowing, voluntary and intelligent choice to waive counsel, and who is made aware of the dangers he faces in proceeding on his own, is guaranteed the right of self-representation by Faretta, regardless of which defense he chooses to assert.

Because of the failure of the record to reflect a proper waiver of counsel and an informed decision about self-representation, the judgment is reversed and the cause remanded for a new trial.

W. C. DAVIS, Judge

Delivered September 10, 1980
En Banc

Douglas, J. and T. Davis, J. dissent

No. 62,534

SAMUEL HAWKINS
Appellant,

vs.

THE STATE OF TEXAS, Appellee

APPEAL FROM

TRAVIS County

REVERSED AND REMANDED

OPINION BY

V. C. DAVIS
Judge

EN BANC

Douglas, J and T. Davis, J
Dissent

FILED IN
COURT OF CRIMINAL APPEALS
SEP 10 1980

Thomas Lowe, Clerk

RESPONDENT'S APPENDIX B

OCT 17 1980

Thomas Lowe, Clerk

NO 62, 534

IN The Court OF Criminal Appeals

SAMUEL C. HAWKINS — Appellant

VS

The STATE OF Texas — Appellee

Brief Statement For Rehearing

TO The Honorable Court OF Criminal Appeals.

NOW comes The Appellant And would Show The Court The Following.

I

Appellant IS IN Full Agreement with The State's motion For leave TO File MOTION For Rehearing IN That This Court Erred IN Reversing Appellant's Case ON This ISSUE OF SelF Representation.

II

Appellant IS IN FULL AGrrement with The STaTe's Prosecution Council's Brief That This Court Erred IN Reversing Appellant Case ON This ISSUE OF SelF Representation.

III

Appellant's MOTION Filed Earlier IN This Court AGreeing For a Rehearing also AGrees That This Court did INdeed erred.

Appellant was Denied Due Process under 40.09 Sec 13 Also 44.33 OF The Code OF Criminal Procedure and a Full Rehearing And Consideration OF Appellant's Pro se Brief according TO 37.071 Code OF Criminal Procedure, Should Result.

For These Reasons and Laws This Court Should Review Appellant's Pro se Brief, And Grant A Rehearing TO The State.

Samuel Hawkins
Ellis unit #590 — 77340

Copy TO

State's Attorney
Box 12405 Capital Station
Austin Tex 78711

Prosecutor's Council P.O. Box 13555
Austin Texas 78711

District Attorney Tom Curtis
Potter County Courthouse
Amarillo Texas 79101

10/14/80

NO. 62,534

RECEIVED IN COURT OF CRIMINAL APPEALS
SEP 30 1980
Thomas Lowe, Clerk

IN The COURT OF Criminal Appeals
AT AUSTIN

SAmuel HAWKINS — Appellant
VS
The State OF Texas — Appellee

APPellANT'S ANSwer TO The STATE
MOTION FOR A ReheARING

OPINION

SINCE The Record does NOT AFFirmatively ReFlect APPellANT'S INTelligENT, VOLUNTary AND KNOWING WAIVER OF REPRESENTATION by COUNSEL AND That He was AWARE OF The Dangers and disadvANTages OF SELF REPRESENTATION. The CASE MUST be REMANDED FOR A NEW TRIAL.

APPellANT'S POSITION

APPellANT Did INdeed INTelligENTly, VOLUNTarily KNOWINGly WAIVE COUNSEL FOR TRIAL AND FOR APPEAL REPTESENTATION

APPellANT Did INdeed Receive Proper ACIMONISH MENT FROM The HONORable TRIAL COURT, AND WAS IN FACT TOLD The Dangers and disadvANTages OF SELF REPRESENTATION

APPellANT AGREES with The STATE That This COURT Did INdeed ERRED.

Appellant Did Not Waive his Right To Review His pro se Brief And did Indeed Represented himself ON This Appeal and Under 40.09 OF The Code OF Criminal Procedure was denied due process by this Court.

Appellant's pro se Brief IS answered by The State IN this Court.

This Court Should Reverse IT's decision and Rehear This Case IN Full compliance with Art 40.09 C. C. P. and Rule ON The Pro-se Brief.

Appellant Did NOT Know The Texas Civil Liberties UNION was going TO Argue ANY Other Brief Than Appellant's Pro se Brief. All Appellant's (17) Seventeen Grounds OF Error was Answered by The State, IN This Court.

A Rehearing Should be Granted TO The Appellant and The State IN The Interest OF Justice, under Art 40.09 C. C. P.

So prayed.

Samuel Hunkins #590

Copies
Tom Curtis Potter County Courthouse D.A.
Amarillo. Texas 79101

Robert Huttash State Prosecuting Attorney
Box 12405 Capital Station Austin Tex 78711

To C.L.U. Bob ozer 29 Floor Tower Life building
San Antonio Texas 78025

NO. 62,534

IN The Court OF Criminal Appeals
AT Austin

SAMuel C. HAWKINS — Appellant
vs
The State OF Texas — Appellee

APPellANT's MOTION AND ANSWER AGreeING With The State For A Rehearing, That This Court Erred

TO The HONorable COURT

COMES NOW SAMuel HAWKINS APPellANT IN This Case AND Prays This HONorable COURT TO GrANT leave For The State TO File MOTION For Rehearing, AND PurSUANT TO The Rules OF This HONorable COURT.

Respectfully

Samuel Hawkins
Ellis Unit #1 590
Huntsville Texas 77340

RESPONDENT'S APPENDIX C

NO. 62,534

RECEIVED IN
COURT OF CRIMINAL APPEALS
FEB 05 1981
Thomas Lowe, Clerk

IN The COURT OF Criminal Appeals
OF The State OF Texas

NO. 56,243 Travis COUNTY
Judicial District Court Number

SAMUEL C. HAWKINS — APPELLANT
VS
The STATE OF Texas — APPELLEE

APPELLANT'S MOTION OPPOSING Texas Civil Liberties MOTION FOR Rehearing ON APPELLANT'S SELF REPRESENTATION.

PURSUANT TO ARTICLE 1 SECTION 10 Texas CONSTITUTION.
FARETTA VS CALIFORNIA 422 U.S. 806 95 S. CT. 2525 45 L Ed 2d 561 The above mentioned MOTION by Texas Civil Liberties Should be dismissed.

Dr James ROSEN WAS NOT APPOINTED by ANY COURT TO EXAMINE APPPELLANT FOR ANY REASON AND The Record does NOT SUPPORT HIS CONTENTION OR EVALUATION OR OPINION, ON SELF REPRESENTATION.
APPELLANT DID NOT Request HIS EVALUATION OR OPINION FOR ANY REASON. HIS OPINION has NO VALUE IN This Case AND Should NOT be A PART OF This COURT'S OPINION, AS IT IS NOT A PART OF ANY ~~Record~~ before This COURT, ON SELF REPRESENTATION by The APPELLANT.

Appellant has Applied For A Thirty Day Stay To Proceed ON His Appeal Pro Se After This Court Two Times, original and ON Rehearing has AFFirmed Appellant Pro Se brief.

Wherefore Premises Considered Appellant Pray That This motion IN All Things be Granted

So Prayed

Samuel Hawkins
Ellis unit #590
Huntsville Texas
77340

1, 31, 81

C.C.
Texas Civil Liberties Bob Ozer
29 Floor Tower Life building SAN ANTONIO Tex
78205

Potter County Courthouse D. A's OFFICE
Amarillo Texas 79101 Tom Curtis

NO 62, 534

IN The COURT OF Criminal Appeals
AT AUSTIN

SAMUEL HAWKINS — APPELLANT
VS
The STATE OF TEXAS — APPELLEE

TO The HONORable COURT

I have this Day Received a letter and motion from Attorney Bob Ozer Requesting Oral Argument at the Releasing October 22nd 1980.

I ask this Court to Deny him Oral Argument, and to end his forced Counsel on me.

I am aware of this fact that this is a Death Sentence case.
As much as Gilmore in Utah and Bishop in Nevada who Both Chose execution Rather than Appeals.

I too Choose to Appeal my case Pro se Succesfully or die. no Other way.

Samuel Hawkins
#T 590 Ellis unit

Copy to
Bob Ozer Levey and Goldstein
29 floor tower life building San Antonio
78205

MOTION FILED
MAY 16 1981

No. 80-6514

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SAMUEL HAWKINS,

Petitioner,

—v.—

STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

MOTION FOR LEAVE TO FILE AND BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI OF THE AMERICAN CIVIL LIBERTIES UNION AND THE TEXAS CIVIL LIBERTIES UNION, AMICI CURIAE

ROBERT OZER
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(212) 944-9800

Attorneys for *Amici Curiae*

May 13, 1981

No. 80-6514

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

SAMUEL HAWKINS,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

ON WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

MOTION FOR LEAVE TO FILE
BRIEF AMICI CURIAE

The American Civil Liberties Union (ACLU) and the Texas Civil Liberties Union (TCLU) hereby jointly move pursuant to Rule 36.1 of this Court's Rules for

le ve to file the attached brief amici curiae in support of the petition for certiorari.

The American Civil Liberties Union is a nationwide, non-partisan organization of over 200,000 members, dedicated to defending the principles embodied in the Bill of Rights. The Texas Civil Liberties Union (TCLU) is one of its state affiliates. The ACLU and TCLU have long opposed the death penalty, and have urged especially careful review of convictions where it may be imposed.

Although we are aware of the Court's general policy disfavoring amicus briefs prior to consideration of the petition for certiorari, and have filed such briefs only in rare circumstances, the extensive involvement of the TCLU below and the special nature of an important issue which was considered below but has

not been raised here have compelled us to urge review.

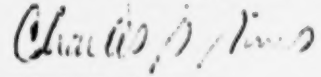
Extensive personal contact between one of the TCLU's cooperating attorneys and petitioner Hawkins prior to the appeal below led the TCLU to conclude that Hawkins' waiver of the right to counsel was not intelligently and competently waived under Westbrook v. Arizona, 384 U.S. 150 (1966) and Rees v. Peyton, 384 U.S. 12 (1966). The TCLU appeared in the Texas Court of Criminal Appeals urging that point, and the court initially agreed, vacating the conviction and remanding for a new trial on the ground that defendant had not been properly advised of the consequences of representing himself. Subsequently, however, the state petitioned for rehearing, joined by the defendant (who asked the court to review other errors but not the claimed incompetent Sixth Amendment

waiver), and the court reversed itself and reinstated the conviction. It did so without remanding for a hearing regarding defendant's competency to represent himself, as required by Westbrook and Rees. The TCLU thereupon moved for reconsideration, submitting a letter from a psychologist who had examined defendant extensively and found him so paranoid as to preclude effective waiver of counsel or capacity for self-representation. The expert concluded that the refusal to accept assistance of counsel was not intelligent or competent, but rather a product of defendant's paranoid thought process. However, the Texas Court of Criminal Appeals denied the motion.

Under these circumstances, we feel a duty to bring the Westbrook - Rees issue to the Court's attention as amici curiae. We urge remand for the hearings

those cases require where, as here, the record so plainly raises serious doubts that the waiver of counsel was effective.

Respectfully submitted,



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Attorneys for
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May 13, 1981

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THE COURT SHOULD GRANT THE PETITION FOR CERTIORARI TO DECIDE WHETHER A CONVICTION AND DEATH SENTENCE FOR CAPITAL MURDER ARE CONSISTENT WITH WESTBROOK v. ARIZONA AND REES v. PEYTON, WHERE THE TEXAS COURTS FOUND PETITIONER HAD INTELLIGENTLY AND COMPETENTLY WAIVED THAT HIS RIGHT TO COUNSEL WITHOUT EXAMINING HIS MENTAL COMPETENCE TO WAIVE THAT RIGHT, EVEN THOUGH THE RECORD INDICATED SUBSTANTIAL DOUBT THAT HE HAD THE CAPACITY TO WAIVE COUNSEL OR THAT HE UNDERSTOOD THE SPECIAL DANGERS OF SELF-REPRESENTATION IN A CAPITAL CASE WHERE THE SOLE DEFENSE WOULD BE INSANITY.....19

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No. 80-6514

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

SAMUEL HAWKINS,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI OF THE AMERICAN CIVIL LIBERTIES UNION AND TEXAS CIVIL LIBERTIES UNION AMICI CURIAE

QUESTION PRESENTED

Whether a conviction and death sentence for capital murder are consistent with Westbrook v. Arizona, 384 U.S. 150 (1966) and Rees v. Peyton, 384 U.S. 312 (1966) where the Texas courts found defendant had intelligently and competently waived his right to counsel without examining his mental competence to waive

that right, even though the record indicated substantial doubt that he had the capacity to waive counsel or that he understood the special dangers of self-representation in a capital case where the sole defense would be insanity.

Interest of Amici Curiae

The interest of amici curiae appears in the foregoing motion.

Citations To Opinions Below

The opinion of the Texas Court of Criminal Appeals for which review is sought was issued on January 14, 1981, and is reported at S.W.2d (1981). The opinion on original submission, which was vacated by the January 14 opinion, was issued on September 10, 1980 and is reported at S.W.2d (1981).

Jurisdiction

This Court has jurisdiction under 28 U.S.C. §1257(3).

How the Federal Question Was Presented and Decided Below

The Texas Court of Criminal Appeals expressly ruled on the question amici raised here. Appearing amicus curiae, the Texas

Civil Liberties Union filed a brief urging that the record was inadequate to demonstrate an intelligent and competent waiver of his right to representation by counsel. On original submission, the court agreed, and reversed and remanded for a new trial. Subsequently, the issue was again raised and decided, this time adversely, by the Court in its January 14, 1981 decision. The issue was raised again by the TCLU in its motion for rehearing, and rejected on February 4, 1981.

Statement of the Case

Petitioner has asked this Court to review his conviction for the murder of a 12-year old girl during the course of kidnapping and attempted rape. His defense of insanity was rejected by the jury, which subsequently sentenced him to death.

Both at trial[1] and on appeal, petitioner was permitted to represent himself and proceed pro se.

The trial court discerned a question of competency to stand trial and conducted a competency hearing. Rec. Vol. II at 307-335. However, the testimony presented at the hearing was relevant only to a determination of petitioner's competency to stand trial. No separate hearing was held, and no direct evidence was received on the different question of petitioner's competency to waive counsel or his capacity to conduct his own defense. No psychological

---

1/ Although the trial court appointed a standby attorney for defendant, that attorney's role was limited pursuant to court instructions [Rec. Vol. I at 138 (references are to statement of facts)], and that attorney at no point in the course of trial actively participated in the presence of the jury.

data was presented at that hearing, or at any other pretrial proceeding, regarding the capacity of petitioner to conduct his own defense or his competence to waive his right to counsel. Moreover, although the court was by then aware that the sole defense to be presented at trial would be insanity, the court made no effort to admonish petitioner as to the special dangers and disadvantages of self-representation in presenting an insanity defense, much less an insanity defense in the context of a capital murder trial involving expert psychiatric testimony and specialized procedures.

The likelihood that petitioner suffered from on-going mental problems is apparent from psychiatric reports written to presiding judges prior to trial [Rec. Vol. X at 1959-1961] as well as testimony at the guilt-innocence stage [Rec. Vol.

IX pp. 1748, 1755-1756, 1771-1772], which contained sufficent evidence of petitioner's depression, poor impulse control, intolerance for anxiety, and delusional system causing episodic insanity to trigger a factual hearing on his ability to waive counsel.

"Q. How is he sick right now?

A. He has very poor impulse control. He has very deep, intense emotions, particularly regarding sexuality and anger and confusion between the two. He goes through episodic depression. He has the [paranoid] delusional system which he can get into, and he has no tolerance for anxiety; that is he has very little tolerance for internal drive and handling and mediating it over time and he has very little tolerance for external pressure and demands." [Rec. Vol. IX pp. 1771-1772, testimony of Dr. Wall]

* * * * * *

"Following this rather extensive workup I came to the conclusion that Samuel Hawkins represents a diagnostic entity, a classic case of true paranoia. By definition, I consider this condition to be an extremely rare condition characterized by the gradual development of an intricate, complex and elaborate paranoid system of thinking and

based on misinterpretation of actual events. Frequently this individual considers himself endowed with unique and superior ability. In spite of a chronic course, this condition does not seem to interfere with the rest of the individual's thinking and personality." [Letter from Dr. Hugh A. Pennal to the Honorable Edward B. Nobles, 12/29/77, Defendant's Exhibit Number 3, Rec. Vol. X. at 1960.]

* * * * * *

"Delusional System: A marked delusional system is apparent which is fully developed ingrained and unquestionable. In this delusional system, whites have oppressed blacks for a long period of time just as the Egyptians oppressed the Jews, so God has appointed some Black people today to help gain the Blacks release from White oppression...

Diagnosis: Although the character is fairly stable otherwise, when his delusional system is energized Samuel Hawkins is psychotic! The diagnosis is paranoia." [Letter from Dr. Richard Lee Wall to Judge Richard N. Countiss, 2/16, 17/78, Defendant's Exhibit Number 2, Rec. Vol. X at p. 1959]

* * * * * *

> "In terms of legal insanity, it is my professional opinion he has had and can have episodes in his life during which he would be judged legally insane. When his anger, depression and sexuality intensify, he simply does not have the defensive capability for rational control." [Letter of Dr. Richard Lee Wall to Judge Countiss, 2/8/78, Defendant's Exhibit Number 4, Rec. Vol. X at p. 1961.]

On original submission to the Texas Court of Criminal Appeals pursuant to contentions advanced by the Texas Civil Liberties Union amicus curiae, the court reversed the conviction and remanded for a new trial "[b]ecause of the failure of the record to reflect a proper waiver of counsel and an informed decision about self-representation." Hawkins v. State, S.W.2d , Slip Opinion, September 10, 1980, at 3 (hereinafter Hawkins I). The court did not find it necessary to reach the further issue raised by amicus regarding petitioner's actual competence to waive counsel or his capacity for self-repre-

sentation, relying instead solely on the insufficiency of "the trial court's admonitions...to meet either the standard for waiver of counsel or the standard enunciated in Faretta [v. California, 422 U.S. 806 (1976)]." The court also necessarily failed to reach the various legal errors petitioner had raised in his pro se brief.

The state petitioned for rehearing seeking affirmance of the conviction. Petitioner joined that petition, urging the court to vacate the order remanding for a new trial and to "rule on the pro se brief", notwithstanding the fact that even if the court were to agree with any of his claimed errors he would have been entitled to no broader relief.

The court granted the state's petition for rehearing, vacated its order, and proceeded to consider (and dismiss)

each of petitioner's remaining claimed errors. Hawkins v. State, S.W.2d , Slip Opinion. January 14, 1981, at 1 (hereinafter Hawkins II). Although it conceded that petitioner's ability to represent himself "has been seriously questioned", id. at 2, the court found that testimony in a subsequent capital case involving this defendant pending in the lower Texas courts, cause No. 65,000, which it judicially noticed, "established conclusively that appellant is well advised as to his right to counsel and the dangers and disadvantages of self-representation, and knowingly and intelligently waived the right and insisted on risking the potential detriment of representing himself." Id. The court reasoned that by joining the State in a Petition for rehearing in this case, petitioner had "in effect concede[d] the errors asserted by the State" in its Appli-

cation for Rehearing. Id. at 3.

In fact, the factual predicate for granting the petition for rehearing -- namely that the hearing in No. 65,000 had established petitioner's knowing and intelligent waiver of his right to counsel -- was not supported by the record, and was erroneous. At no point in the proceedings in Cause No. 65,000, judicially noted in Hawkins II, was psychological or psychiatric data presented on the issue of petitioner's competency to waive counsel or capacity for self-representation. Nor was petitioner advised at that hearing that self-representation raised special risks in the context of an insanity defense or in a capital trial. Indeed, the hearing transcript in No. 65,000 provided additional grounds for doubting defendant's ability intelligently and competently to waive counsel:

(By the Court)

"Q. You have also alleged that your attorneys conspired with the State to promote your conviction. Do you understand that you are assuming matter--stating matters to the Court of Criminal Appeals that would require a high degree of technical experience, expertise to prove. You understand that?

(By Mr. Hawkins)

"A. Judge, the record speaks for itself. There is not a slight problem for me to go through the record and the brief to show you one hundred per cent conspiracy. It's easy. I can easily do it. [Rec. Cause No. 65,000 Hearing on Motion To Dismiss Counsel for Appeal Purposes and to Proceed Pro Se (hereinafter "Hearing") at p. 29]

* * * * * *

(By Mr. Hawkins)

"It is obvious from the record -- it's obvious from [my] attorneys appeal brief that he has deliberately denied my effective assistance of counsel and the State is fully aware of it." [Rec. "Hearing" at p. 44].

(By Mr. Hawkins)

"For the State to sit back and deny me this right was wrong, was flat wrong, and for my attorney to conspire with this type of action, not

only in the course of trial, but in appeal was wrong and I can just go on" [Rec. "Hearing" at pp. 49-50].

* * * * * *

(By Mr. Hawkins)

"In the District Clerk's office, I have a certification slip where she or he or whoever signed it. Not with me, but I indeed have certification slip also that very same brief that I filed in Lubbock County District Attorney's office. Now, again, here's what I'm saying. All this -- this is also one of the procedures that has frustrated me with the system. I don't know whether there has been a conspiracy between you [Mr. Cross] and Verna Boyd, the district clerk here. Somehow he refused to file things I have sent down there. [See "hearing" at p. 93].

The conflict between defendant's testimony in Cause 65,000 and this case, which should have emphasized for the Texas Court of Criminal Appeals the need for a factual hearing on defendant's competence to waive counsel, is evidenced by defendant's confusion in assessing his own competence and sanity. At the hearing in Cause No.

65,000 he disclaimed any history of psychiatric difficulty,[2] even though in this case he had previously filed a pro se motion for a hearing on his competency to stand trial, had given "written notice that the issue of insanity at the time of trial may be raised," Hawkins II at 5-6, and had presented an

---

[2] (By the Court)

"Q. Do you make any claim that you are subject to fits of temporary insanity which would interfere with your handling your own appeal?"

"A. Never been evident to me". [Rec. "Hearing" at pp. 19a-20].

* * * * * *

(By Mr. Hawkins)

"A. There is nothing in my background dealing with competency or insanity so that would not affect this situation at all" [Rec. "Hearing" at p. 92].

insanity defense in this case as his only defense.[3/]

Accordingly, on motion for rehearing relying on Rees v. Peyton, 384 U.S. 312 (1966), amicus submitted to the Court of Criminal Appeals the notarized letter of Dr. James Rosen, Ph.D. (attached hereto and made a part hereof as Exhibit "A"), which reads in pertinent part:

> At the request of his estranged wife, I saw Samuel Hawkins professionally while he was incarcerated in the Travis County Jail in Austin, Texas. I met with Sam on four separate occasions (12/14/78, 12/15/78, 12/21/78, 12/27/78) for a total of six hours of clinical interview and psychotherapy. Since that time Sam and I have maintained contact by mail. I have

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3/ Defendant repeatedly insisted in Cause No. 65,000 that he was not raising or was expressly waiving issues of insanity and competency (See Rec. "Hearing" at 86-89, 115-119), but the defense counsel appointed to assist him there inconsistently maintained that defendant was "adamant" in his claims of incompetency and insanity (Id. at 115-119) during the course of trial.

received in excess of fifteen letters from him.

I believe that I have had sufficient contact with Samuel Hawkins to make a clear diagnosis. My diagnosis of him is Paranoia (see DSM-III, 297.10). This is to be distinguished from Schizophrenia of the paranoid type (see DSM-III, 295.3x).

A diagnosis of Paranoia means that while Sam is not prone to hallucinations or incoherence (which are characteristic of Schizophrenia), he is psychotic and incapable of making certain rational choices. His thinking is filled with persistent persecutory delusions. As part of his illness, Sam is totally incapable of trusting people. I am not speaking of distrust in the neurotic sense, where an individual has a difficult time forming close bonds with others. Sam's is a sickness, a psychotic disorder, with a deep distrust which forces him to misinterpret actual events. His mind is then forced to support his own misinterpretations with self-persecutory delusions.

I am somewhat familiar with Sam's case, and I am aware that he demands to act as his own attorney. Should we be surprised by this action? Of course not. How could he do otherwise. He is a psychotic man whose illness totally prevents him from trusting and from accepting the help of any authority.

> It is my professional opinion that Samuel Hawkins does not have the capacity to make a rational decision as to whether or not to represent himself. He will refuse the aid of counsel every time. He must do so. This is part of his particular illness. His rejection of attorneys is a direct expression of his paranoia. [See Exhibit "A" at 1-2].

In February, 1981, the Texas Court of Criminal Appeals denied the motion without opinion.

ARGUMENT

THE COURT SHOULD GRANT THE PETITION FOR CERTIORARI TO DECIDE WHETHER A CONVICTION AND DEATH SENTENCE FOR CAPITAL MURDER ARE CONSISTENT WITH WESTBROOK v. ARIZONA AND REES v. PEYTON, WHERE THE TEXAS COURTS FOUND PETITIONER HAD INTELLIGENTLY AND COMPETENTLY WAIVED HIS RIGHT TO COUNSEL WITHOUT EXAMINING HIS MENTAL COMPETENCE TO WAIVE THAT RIGHT, EVEN THOUGH THE RECORD INDICATED SUBSTANTIAL DOUBT THAT HE HAD THE CAPACITY TO WAIVE COUNSEL OR THAT HE UNDERSTOOD THE SPECIAL DANGERS OF SELF-REPRESENTATION IN A CAPITAL CASE WHERE THE SOLE DEFENSE WOULD BE INSANITY.[4/]

In its first decision in this case, the Texas Court of Criminal Appeals found that the record in this capital murder

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4/ Although this amicus curiae brief is limited to the question of petitioner's competence to represent himself, we believe that petitioner's pro se claim that his confession was involuntary also merits review by this Court.

The transcripts of a tape recording of a portion of the interrogation in this case, received in evidence at the pre-trial suppression hearing, document that petitioner was repeatedly plied with promises of "help" and psychiatric assistance and was led to believe that he was not at fault for his acts because they were the product of a "sickness" akin to a common cold or a per-

(footnote continued on following page)

conviction "was not sufficient to meet either the standard for waiver of counsel or the standard under Faretta: "...[t]he record does not affirmatively reflect appellent's

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(footnote continued from preceding page) son's physical characteristics (See "Supplement" to pro se Petition and appendices annexed thereto.) These statements, made to petitioner after nearly 12 hours of interrogation, might well establish the involuntariness of his confession even if he had not been sentenced to die. However, in the context of this capital case, the police methods revealed by this record present a unique question worthy of review on certiorari.

In a non-capital case the State might argue that the interrogators' statements merely held out the hope of psychiatric help after conviction, in prison or perhaps in a prison mental hospital. But here the State used the confession obtained under these circumstances to seek petitioner's execution -- the very antithesis of "helping" him. To promise a prisoner "help" for his "sickness," and then use the resulting confession to kill him, certainly raises very serious doubts about the voluntariness of that confession. Whether a confession obtained by such methods can survive the test of voluntariness established by this court in analogous situations, see, e.g., Leyra v. Denno, 347 U.S. 556 (1954), Spano v. New York, 360 U.S. 315 (1959), is a question worthy of plenary consideration by this court.

intelligent, voluntary and knowing waiver of representation by counsel." In fact, the record showed not only that deficiency, but in fact disclosed substantial ground for doubting that defendant had the mental capacity to execute an intelligent Sixth Amendment waiver.[5] Nevertheless, after a motion for rehearing in which the defendant joined the state in seeking vacation of the remand for a new trial,[6] the Court of Criminal Appeals vacated its decision, although not its finding, because it believed that the defendant had effectively "conceded" the errors asserted by the State.

5/ See supra at 6-9, 12-15.

6/ The defendant also sought reversal and a new trial on a number of other legal grounds, all subsequently rejected, which he has raised here in his petition for certiorari. Had the Texas Court of Criminal Appeals agreed with any of those grounds, remand for a new trial would have been the most relief defendant could have received.

It did so without holding any hearing, or remanding for one, to inquire into defendant's mental competence to "concede" (or waive) the error, on the basis of a hearing in another case, subsequent to the trial in the case under review, where there was no inquiry into defendant's mental state.

All this occured even though there was a special need for reliability in the procedures for the trial and sentencing phase of defendant's case because this is a capital case[7/], and despite the fact that the sole defense raised at trial was insanity. The conviction and death sentence below procured under these circumstances

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7/ See, e.g., Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Lockett v. Ohio, 438 U.S. 566, 608 (1978); Gardner v. Florida, 430 U.S. 349, 358 (1977); Beck v. Alabama, 447 U.S. 625, 637-38 n.13 (1980).

conflicts with this Court's previous cases involving waiver of counsel by dubiously competent defendants, and in light of defendant's sentence of death warrants review by certiorari.

A. The Decision Below is Directly Contrary to This Court's Holding in Westbrook v. Arizona that Whenever There Is Factual Doubt Concerning A Defendant's Ability to Waive His Right to Counsel in A Capital Case, the Trial Court Should Conduct A Factual Inquiry on That Precise Point.

This court has long distinguished general competence to stand trial from competence to waive the Sixth Amendment right to counsel:

> "One might not be insane in the sense of being incapable of standing trial and yet lack the capacity to stand trial without benefit of counsel."

Massey v. Moore, 348 U.S. 105 at 108 (1954).

In Westbrook v. Arizona, 384 U.S. 150 (1966), the Court concluded that, when raised by the evidence, the trial court must conduct a specific inquiry into the capital defendant's competence to waive the right to an attorney, an obligation not met by a hearing inquiring only into competence to stand trial (384 U.S. at 150):

> Although petitioner received a hearing on the issue of his competence to stand trial, there appears to have been no hearing or inquiry into the issue of his competence to waive his constitutional right to the assistance of counsel and proceed as he did, to conduct his own defense.

The nature of the inquiry the Court required is clear from Rees v. Peyton, 384 U.S. 312 (1966), another capital case, decided just three weeks later, where the Court emphasized the necessarily technical nature of the inquiry into competence to waive the right to counsel and undertake self-representation:

> The question to be answered is whether the defendant has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand, whetherhe is suffering from a mental disease, disorder or defect which may substantially affect his capacity in the premises.

Rees, supra, 384 U.S. at 314.

The Westbrook Court held that although the defendant who had been sentenced to death had received a hearing on competence to stand trial, the record disclosed substantial doubt that the trial court had fulfilled its "protecting duty" to ensure the waiver of counsel had been intelligent and competent. Accordingly, it vacated the judgment and remanded for further inquiry in the state courts under the general standards of Pate v. Robinson, 383

U.S. 375 (1966).[8/]

Here, as in Westbrook, petitioner was given a hearing as to his competence to stand trial. However, that hearing

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8/ Although Pate involved competence to stand trial, many of its standards for determining effectiveness of waiver are fully applicable to waiver of the right to counsel as well. Nevertheless, it is clear that the standard for effective waiver of counsel is generally higher than the standard for competence to stand trial, since a higher level of functioning may be required to conduct one's own defense than to assist an expert. Compare Dusky v. United States, 362 U.S. 402 with Rees v. Peyton, 384 U.S. at 314. See, e.g., Sieling v. Eyman, 478 F.2d 211, 214 (9th Cir. 1973); United States v. Dougherty, 473 F.2d 1113, 1123 (D.C. Cir. 1972); United States ex rel. Konigsberg v. Vincent, 526 F.2d 131, 133 (2nd Cir. 1975); United States v. Masther, 539 F.2d 721, 726 (D.C. Cir. 1976).

related solely to petitioner's competence to stand trial, that is, his "present ability to consult with his lawyer with a reasonable degree of rational understanding", to understand, rationally and factually, the proceedings against him. Dusky v. United States, 362 U.S. 402 (1960). See, e.g., Rec. Vol. II at 312-313. There was no inquiry regarding defendant's competence at the time of trial to waive the right to counsel, or to conduct his own defense. There was no psychological testimony at any pretrial hearing on his ability to waive counsel or conduct his own defense, which the Court required in Rees. Accordingly, the judgment is in direct conflict with this Court's cases.

The Texas Court of Criminal Appeals attempted to avoid that conclusion by relying on the inquiry conducted in a different capital murder trial involving this defendant, Cause No. 65,000. However,

that hearing took place long after the trial in this case had occured. There was no inquiry in Cause No. 65,000 regarding petitioner's competence to waive counsel in this case, at either the trial level or subsequently on appeal. In fact, as we showed above, see supra at 12-15, the inquiry in Cause No. 65,000 was simply a colloquy between a judge and attorneys unskilled in psychiatric examination and the defendant; no psychological data concerning defendant's mental competence was presented there, either.

Apart from its reliance on a wholly irrelevant inquiry in a different and later case, the state court appeared to rest its second decision on an alternative ground, namely that even if petitioner was incompetent, he had "conceded" (i.e., waived) the error the court had originally found dispositive: the failure to provide defendant sufficient warnings of "the

dangers and disadvantages of self-representation." Slip op. at 2, 3. That ground is equally defective. As this court said in dismissing a similar argument in Pate v. Robinson, supra, where the state had argued that defendant had waived the competence to stand trial issue,

> [I]t is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently "waive" his right to have the court determine his capacity to stand trial.

383 U.S. at 384.

Complying with the rule of Westbrook, the lower courts in the Gary Gilmore, John Evans, and Jesse Bishop cases all carefully inquired into those defendants' competence both to stand trial and waive appellate rights, and this court subsequently relied heavily on those hearings in denying review. See Gilmore v. Utah, 429 U.S. 1012 (1976); Evans v. Bennett, 440 U.S. 1301 (1979) (Rehnquist, Circuit Justice), Lenhard v. Wolff, 443 U.S. 1306 (Rehnquist, Circuit

Justice). As we have shown above, the record here was more than sufficient to trigger the trial court's "protective duty" to make that specialized inquiry required by Westbrook, and which this Court mandated on its own motion in Rees. The failure to do so warrants this Court's review, and remand for the requisite inquiry.[9]

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[9] Although petitioner would be able to file a state habeas corpus petition should this court deny review, the waiver of counsel problem is likely to recur and, in light of the action taken by the Texas Court of Criminal Appeals, infect any subsequent state proceedings. Similarly, we have every reason to believe that petitioner will continue to insist on representing himself on federal habeas corpus. Vacating and remanding the judgment below is required to ensure that petitioner's competence to represent himself is established before any further proceedings take place in this capital case.

B. In Deciding Whether A Defendant Raising An Insanity Defense In a Capital Punishment Case Has Intelligently And Competently Waived His Constitutional Right to Counsel, The Court On Its Own Motion Must Admonish the Defendant That Competent Self-Representation May Prejudice That Defense.

This Court has long stressed that the abandonment of the constitutional right to counsel must be competently and intelligently made, and may not be presumed from a silent record. "Courts indulge every reasonable presumption against waiver of fundamental constitutional rights." Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Carnley v. Cochran, 369 U.S. 506, 514-516 (1962).[10/]

10/ Even as to the less stringent waiver requirements of the Fourth Amendment, regarding the capacity to consent to search, the Court has held that the "traditional definition of voluntariness...has always taken into account evidence of minimal schooling, low intelligence, and the lack
(footnote continued on following page)

More recently, in Faretta v. California, supra, the Court held that at least in the context of self representation, the defendant must be made aware not only of the right sought to be waived as in Johnson v. Zerbst, supra, but also of the consequences of waiving the right to counsel in the sense of knowing the "dangers and disadvances of self representation":

> he should be made aware of the dangers and disadvantages of self representation so that the record will establish that 'he knows what he is doing and his choice is made with his eyes open.'

(footnote continued from preceding page) of any effective warnings to a person of his rights" noting that the "voluntariness of any statements taken under those conditions" must be "carefully scrutinized". Schneckloth v. Bustamonte, 412 U.S. 218, 248 (1973). Here, the trial court noted that defendant was not qualified educationally to represent himself [Rec. Vol. I at p.7]. Moreover, defendant's psychiatric background revealed an extensive history of paranoia and psychosis. [Rec. Vol. IX at pps. 1748, 1755-1756, 1771-1772; Vol. X at pps. 1959-1961]

Faretta v. California, 422 U.S. at 835, quoting from Adams v. United States ex rel. McCann, 317 U.S. 269, 279 (1943).

Neither the record at trial nor in the hearing in Cause No. 65,000 (held long subsequent to trial in this case) shows that the stringent requirements of Faretta have been complied with in light of the substantial prejudice self-representation would have on an insanity defense. Self-representation would by its very nature tend to convey to jurors that the defendant was capable of acting sanely and logically, and would thus prejudice his claim that he was insane and acting illogically at the time of the crime.[11] Especially in a

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11/ In Walker v. Butterworth, 599 F.2d 1074 (1st Cir. 1979), cert. denied 448 U.S. 915, the Court of Appeals reversed a conviction on Fifth Amendment grounds where the trial court, pursuant to traditional Massachusetts practice, had required a defendant (who was represented by counsel) and whose defense (footnote continued on following page)

capital case where insanity was the sole defense, and therefore punishment by death extremely likely if the defense were not believed, such prejudicial impact would be devastating. Under Faretta, therefore, defendant should have been admonished as to the probable prejudicial impact self representation would have on his insanity defense.[12/]

(footnote continued from preceding page) was insanity, to exercise personally his peremptory challenges of prospective jurors. The Court found that personally assisting in an insanity defense to the extent of personally challenging jurors "[a]lmost inevitably carried inferential weight as to [defendant's] past mental condition." 599 F.2d at 1084.

12/ The courts below made no effort to gauge defendant's understanding of jury selection procedures in Texas capital murder trials. Recently §12.31(b) T.P.C. involving jury selection in a capital murder case was overturned by the Supreme Court. Adams v. Texas, U.S. , 65 L.Ed.2d 581 (1980).

Conclusion

Although the issues herein have not been raised by petitioner pro se, they were raised and considered by the courts below, and in any event,

> In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may of their own motion notice errors to which no exception has been taken, if they otherwise affect the fairness, integrity or public reputation of judicial proceedings.

Silber v. United States, 370 U.S. 717, 718 (1962), quoting U.S. v. Atkinson, 297 U.S. 157, 160.

For the foregoing reasons, Amici Curiae respectfully pray that the petition for a writ of certiorari be granted.

Respectfully submitted,

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Counsel for the American Civil Liberties Union and the Texas Civil Liberties Union Amici Curiae

May 13, 1981

APPENDIX A

James Rosen, Ph.D.
Clinical Psychologist
Star Route 9, Box 197
Mena, Arkansas 71953

Phone 509-394-3964 January 21, 1981

I wish to submit some information regarding my professional contact with Samuel Hawkins.

I am a licensed clinical psychologist. I received my Bachelor of Science degree from the University of Illinois at Champaign-Urbana, and I received my Ph.D. in clinical psychology from the University of Texas at Austin. I am currently in private practice in Mena, Arkansas. Until moving away from Austin, Texas in May of 1980, I had a full-time private practice there.

At the request of his estranged wife, I saw Samuel Hawkins professionally while he was incarcerated in the Travis County Jail in Austin, Texas. I met with Sam on four separate occasions (12/14/78, 12/15/78, 12/21/78, 12/27/78) for a total of six hours of clinical interview and psychotherapy. Since that time Sam and I have maintained contact by mail. I have received in excess of fifteen letters from him.

I believe that I have had sufficient contact with Samuel Hawkins to make a clear diagnosis. My diagnosis is Paranoia (see DSM-III, 297.10). This is to be distinguished from Schizophrenia of the paranoid type (see DSM-III, 295.3x).

A diagnosis of Paranoia means that while Sam

is not prone to hallucinations or incoherence (which are characteristic of Schizophrenia), he is psychotic and incapable of making certain rational choices. His thinking is filled with persistent persecutory delusions. As part of his illness, Sam is totally incapable of trusting people. I am not speaking of distrust in the neurotic sense, where an individual has a difficult time forming close bonds with others. Sam's is a sickness, a psychotic disorder, with a deep distrust which forces him to misinterpret actual events. His mind is then forced to support his own misinterpretations with self-persecutory delusions.

I am somewhat familiar with Sam's case, and I am aware that he demands to act as his own attorney. Should we be surprised by this action? Of course not. How could he do otherwise. He is a psychotic man whose illness totally prevents him from trusting and from accepting the help of any authority.

It is my professional opinion that Samuel Hawkins does not have the capacity to make a rational decision as to whether or not to represent himself. He will refuse the aid of legal counsel every time. He must do so. This is part of his particular illness. His rejection of attorneys is a direct expression of his Paranoia.

If I am asked to do so, I will testify to the above in a court of law. And I ask that you do not allow this man, Samuel Hawkins, to make this decision to represent himself.

Sincerely,

/s/

James Rosen, Ph.D.
Clinical Psychologist